Jany 8. 79. Arg'd for Appellee. N. H. Swayne

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# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

No. 107.

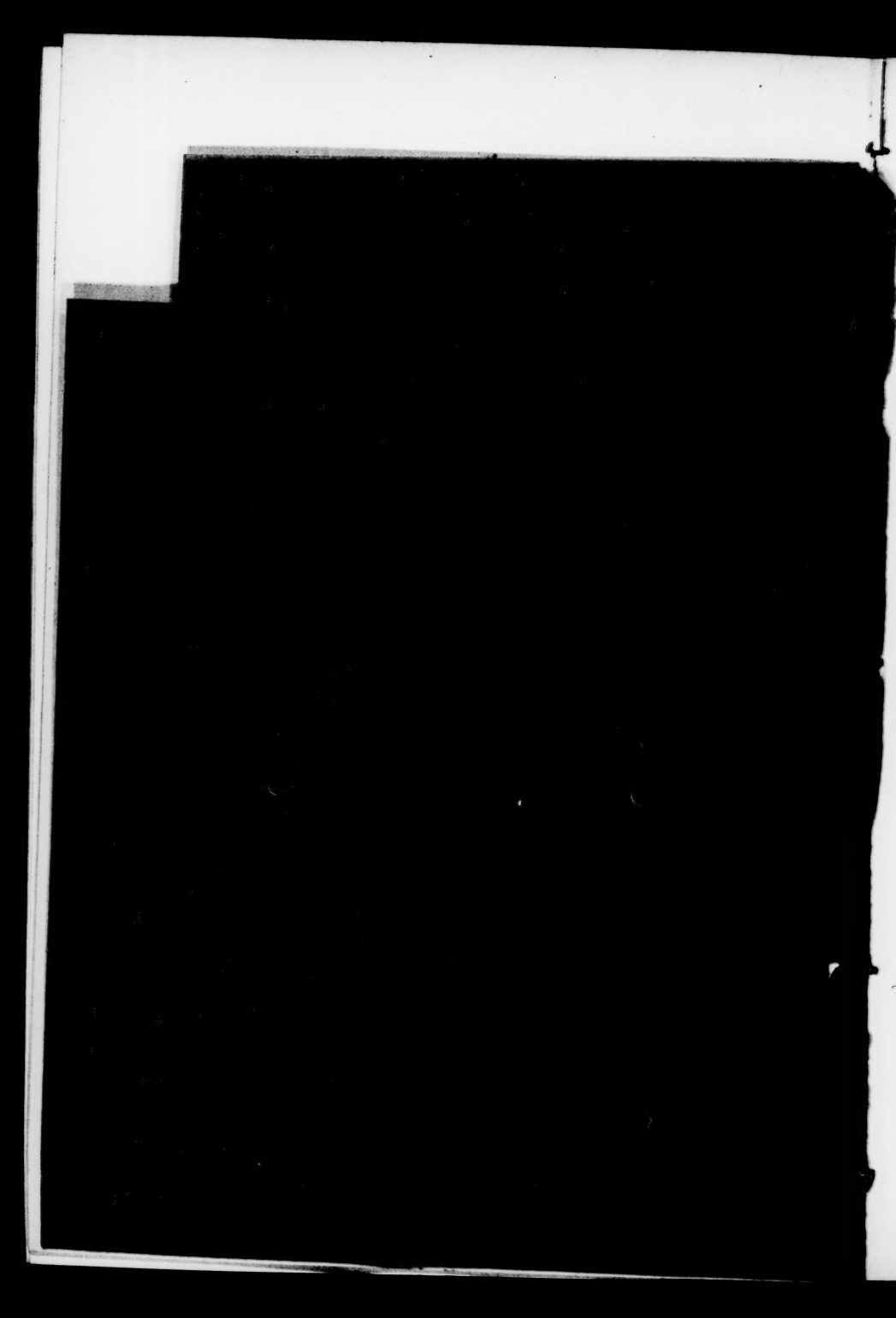
FREDERICK W. BIEBINGER, ASSIGNEE OF YAEGER & CO.,
APPELLANTS,

vs.

THE CONTINENTAL BANK OF SAINT LOUIS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED APRIL 7, 1876.



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INDEX.


| | Original. | Print. |
|---|---|---|
| Bill | 1 | 1 |
| Subpœna | 12 | 5 |
| Return | 13 | 6 |
| Plea, &c | 13 | 6 |
| Additional plea, &c | 15 | 7 |
| Answer | 17 | 8 |
| Replication | 22 | 10 |
| Receipt | 24 | 10 |
| Deposition of T. B. Edgar | 25 | 11 |
| Emil Karst | 44 | 20 |
| M. L. Gray | 63 | 28 |
| H. C. Yeager | 68 | 30 |
| Record and proceedings of foreclosure, &c | 87 | 38 |
| Stipulation as to sale, &c | 129 | 56 |
| Deposition of J. Crangle | 131 | 57 |
| Final decree | 134 | 58 |
| Motion for rehearing | 135 | 58 |
| overruled | 137 | 59 |
| Appeal to Supreme Court | 138 | 59 |
| Bond | 138 | 59 |
| Clerk's certificate | 141 | 60 |

1 THE UNITED STATES OF AMERICA,
*Eastern District of Missouri, ss:*

Be it remembered that heretofore, to wit, on the 19th day of February, A. D. 1874, in the circuit court of the United States, in and for said district, in equity sitting, the following appears of record, to wit:

THE CONTINENTAL BANK, PLAINTIFF,
*vs.*
FREDERICK W. BIEBINGER, ASSIGNEE, &C., defendant. } In chancery.

This day comes the plaintiff, by its solicitors, and files its bill against the defendant in this cause, and on motion of said solicitors it is ordered that a subpœna in chancery be issued against said defendant, returnable to rules on the first Monday of April next.

The said bill of complaint is in words and figures as follows, to wit:

*Bill.*

In the circuit court of the United States for the eastern district of Missouri.

To the judges of the circuit court of the United States for the eastern district of Missouri, sitting in equity:

The Continental Bank, a corporation created by, and existing under the laws of the State of Missouri, and having its place of business at S't Louis, in said State of Missouri, brings this its bill against Frederic W. Biebinger, assignee in bankruptcy of Yaeger & Co., and a citizen of said State of Missouri, and thereupon your orator complains and says:

That for more than seven years now last past your orator has been
2 doing and is now still doing a general banking business in the city of S't Louis, aforesaid; that your orator was incorporated about the year 1865, under the corporate name of National Loan Bank, under which said corporate name it continued to business until about the month of June, 1873, when it was changed to Continental Bank as aforesaid; that some time prior to the year 1866, one Henry C. Yeager and one John Crangle commenced to do business as millers, in said city of S't Louis, under the firm name of Yaeger & Co., and that they continued so to do business under said firm name until shortly before the 24th day of October, 1873, when they were duly adjudged bankrupts by the district court of the United States for the eastern district of Missouri, and that thereafter, and on or about the 19th day of December, 1873, the defendant was duly elected their assignee, and that his election as such assignee was thereafter approved by said district court, and an assignment made to him of all the estate, real & personal, of said bankrupts, on the 22d day of December, 1873.

And your orator further complains and says, that about the 24th of September, 1867, the said Yaeger & Co. commenced to do business with your orator, as their banker, and as such your orator from time to time advanced to them large sums of money to aid them in the prosecution of their busi-
ness and from time to time discounted their drafts drawn against
3 shipments made by them in the course of their business; and that for the purpose of securing itself from loss on account of such advances, made to said Yaeger & Co., your orator required of them that they should deposit with it collateral security for advances and discounts so made and to be made for them by your orator, and that in

compliance with said requirements, said Yaeger & Co. did, in the winter of 1867, deposit with your orator as collateral security for such advances and discounts made and to be made to them, two negotiable promissory notes, each for the sum of twenty thousand dollars, one of said notes bearing date the 23d day of March, 1867, made by C. Harryman & Co., payable on or before two years after said date to the order of said Yaeger & Co., and by them endorsed, bearing interest after maturity at the rate of ten per centum per annum, and secured by a deed of trust on the following described real estate situated in the town of O'Kaw, in the county of Washington and State of Illinois, to wit: Three $\frac{423}{100}$ acres lying on the west side of the southeast quarter of the southwest quarter of section sixteen (16), town. one (1) south, range four (4) west, commencing forty-six (46) feet north of a stone on the west boundary line of said southeast quarter of the southwest quarter, set said stone for the northwest corner of Morgan's addition to the town of Bridgeport, running thence north along the west boundary line 4.62.72 chains to the southwest corner of Harryman street in the town of O'Kaw; thence
4 east along the south side of Harryman street, 7.41 chains to a post, standing for the northeast corner of said 3.429 acre tract, from which post is a stone set for the northwest corner of block No. ten (10), in town of O'Kaw, bears south 86¾° east 100 chains; thence south along the west side of O'Kaw street, 4.62.71 chains to the corner of O'Kaw and Cannady streets, in the town of O'Kaw, forty-six (46) feet north of the northeast corner of block two (2) in Morgan's addition to the town of Bridgeport; thence west along the north side of Cannady street 7.41 chains to the begin'ing, together with all the buildings and improvements thereon; and the other of said notes bearing date the 6th day of September, 1866, made by C. Weihe & Co., payable one year after date to the order of themselves and by them endorsed, bearing interest from date at the rate of ten per centum per annum, payable semi-annually, and secured by certain other real estate situated in said county of Washington and State of Illinois.

And your orator further complains and says that after the deposit of said securities with your orator, it continued to do business with said Yaeger & Co., and from time to time advanced them large sums of money on the faith thereof, and that on or about the 11th day of February, 1871, the said Yaeger & Co., being then indebted to your orator in a sum exceeding the sum of forty thousand dollars, and said notes so deposited as collateral security having long since become due
5 and payable, the said Yaeger & Co. applied to your orator for leave to take said notes and deeds of trust, and stated to the officers of your orator having charge of its business, that it was necessary for them to have said notes and the deeds of trust securing the same, in order that the collection of said notes might be enforced, or that the title to said real estate so mortgaged might be made absolute in said Yaeger & Co., by foreclosure and sale under said deeds of trust for the benefit of your orator, and that thereupon, and on said day last named, and upon the faith of such representations, and of the written agreement of said Yaeger & Co., which is now here to the court shown, your orator entrusted to the possession of said Yaeger & Co. said notes and deeds of trust for the purposes aforesaid only; that within a short time after the said Yaeger & Co. had been so entrusted by your orator with the possession of said notes and deeds of trust, for the purposes aforesaid, and about the 28th day of April, 1871, the said Yaeger & Co. filed in the circuit court of the United States for the southern district of Illinois their bill of complaint for the purpose of foreclosing the said

deed of trust herein mentioned on said property in the town of O'Kaw, and that thereafter such proceedings were had in such cause, that on the second day of March, 1872, a decree of foreclosure was rendered therein by said court in favor of said Yaeger & Co., and against said Harryman & Co., under which said decree a sale was thereafter had of said property, at which the said Yaeger & Co. became
6 the purchaser, and that thereafter, and on the 6th day of December, 1872, a deed was made to said Henry C. Yaeger & John Crangle for said property, by John A. Jones, master in chancery for said circuit court, acting under and in pursuance of said decree of foreclosure and sale; that in and by said agreement of February 11th, 1871, the said Yaeger & Co. promised and agreed, that in case they, the said Yaeger & Co., should not return the said notes and deeds of trust so entrusted to their possession as aforesaid by your orator, within a reasonable time, they would replace them by other collateral securities of equal value to be approved by your orator. And your orator further complains and says that shortly after this making and delivery of said deed by said master in chancery, and about the month of December, 1872, the said Yaeger & Co. did in compliance with the terms of said contract, and in part performance thereof, deposit with your orator, in the place and stead of said note and deed of trust of said Harryman & Co., and as a collateral security for their said indebtedness to your orator, the said master's deed for said real estate above described; that some time after the deposit of said deed with your orator as aforesaid, your orator requested said Yaeger & Crangle, that they would execute to your orator a deed of mortgage on said real estate above described, to secure their said indebtedness in the place and stead of said deposit of said master's deed, which they thereupon agreed to do, and your orator
7 thereupon caused a proper deed of mortgage, as contemplated by said agreement, to be prepared, and in the month of June, 1873, caused the said deed of mortgage, which is now here to the court shown, to be presented to said Yaeger & Crangle to be by them and their wives executed; that the said Yaeger & Crangle expressed themselves to your orator as being satisfied with said deed of mortgage as written, and agreed to execute the same, and to cause the same to be executed by their wives therein named; but your orator further says, that before the said Yaeger & Crangle had executed said deed of mortgage, they failed in business, and that since their failure and their subsequent bankruptcy as aforesaid, they have failed and refused to execute said deed of trust. And your orator now here to this court shows a duly certified copy of said master's deed so deposited with it, and says that it is unable to produce the principal thereof, for the reason that after said deed of mortgage had been prepared as aforesaid, and submitted to said Yaeger & Crangle for their approval, they requested of your orator that it would send them said master's deed for the purpose of comparing the description of said real estate therein described with the description written in said mortgage deed, and that your orator complied with their request and sent them said master's deed, upon, and with the distinct understanding expressed at the time and written on the envelope containing said deed, that your orator parted with the possession
8 of said deed simply for the purpose aforesaid, and that it was to be returned to your orator to hold until said deed of mortgage was executed; and your orator further says, that said Yaeger & Crangle failed to return it, said master's deed, although said deed has often by it been demanded of them, they stating and alleging that all the papers which were in their possession relating to said property had been by

them placed in the hands of their attorney, who denies having possession of the same; and your orator further says, that although it has caused diligent search to be made for said deed, it has never been able to discover the same, and it has cause to believe, and so states, that said deed has been lost or mislaid.

Your orator further complains and says, that at the time of their said failure and bankruptcy, the said Yaeger & Co. were indebted to your orator in a sum exceeding the sum of forty-five thousand dollars; that a small part of said indebtedness was secured by other collaterals which have been disposed of, and the proceeds thereof applied in part payment of said indebtedness, consisting of drafts drawn by said Yaeger & Co., on consignees of merchandise, and by them accepted; that your orator has realized upon a small portion of said acceptances and that a portion of them are still in the process of collection, and that it is impossible for your orator at this time to determine how much it will be able to realize on said acceptances from the accept-
9 ors thereon, but your orator says that over and above all sums heretofore realized or which can hereafter be realized on said collaterals and acceptances, the said Yaeger & Co. are indebted to your orator in a sum exceeding thirty thousand dollars, for which your orator has no other security whatsoever, and which will be wholly lost to your orator *and which will be wholly lost to your orator*, saving and excepting the dividend which may be received thereon from the estate of said Yaeger & Co., in bankruptcy, which can in no event exceed twenty per centum on said claim unless the defendant be compelled to do and perform the contract of February 11, 1871, which has been in no wise performed, except as above stated, and unless the lien and mortgage of your orator on said real estate above described, which said real estate your orator is informed and believes, and therefore states, is worth not exceeding the sum of ten thousand dollars, be enforced by the orders and decree of this honorable court.

To this end, therefore, that the said defendant may, to the best of his knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to all and singular the matters aforesaid, (your orator hereby waiving the necessity of the answer of the defendant being put under the oath of said defendant,) and that as fully and particularly as if the same were here repeated, and he was distinctly interrogated thereto; that an account may be taken of what is due your orator on the security of said deeds of trust, said agreement
10 of February 11th, 1871, and of said deposit of said title deeds thereunder, and that the said defendant may be decreed to pay to your orator what shall in the stating of said account be found due to him, by a short day to be appointed for that purpose by this honorable court, and in default of such payment that the defendant and all other persons claiming, or to claim by, from, or under him may be absolutely barred and foreclosed of and from all right and equity of redemption in and to the said real estate, and every part thereof, or otherwise that the same may be sold, and that the proceeds of such sale may be applied to the satisfaction of what shall be found due to your orator, and for the above purposes that all necessary directions may be given; and may deliver up to your orator all and every the deeds, writings, and documents in his possession, custody, or power relating to the said mortgaged premises and every part thereof; or if for any other reason it should appear to this honorable court that your orator is not entitled to the specific relief hereinabove prayed for, then, that the defendant may be decreed specifically to perform the said contract of Yaeger & Co., with

your orator, your orator being ready and willing, and hereby offering specifically to perform the said agreement on his part; and that your orator may have such further or other relief in the premises as the nature of the circumstances of this case may require, and to your honor shall seem meet,

11 May it please your honors to grant unto your orator a writ of subpœna to be directed to the said Frederic W. Biebinger, thereby commanding him at a certain time and under a certain penalty therein to be limited, personally to appear before this honorable court, and then and there full, true, direct and perfect answer make to all and singular the premises, and further to stand to, perform, and abide such further order, direction, and decree therein as to this honorable court shall seem meet, and your orator, as in duty bound, will ever pray, &c.

HITCHCOCK, LUBKE & PLAYER,
*Solicitors for Complainant.*

UNITED STATES OF AMERICA,
*Western District of Missouri, ss:*

Timothy B. Edgar, being duly sworn, deposeth and saith that he is now and was at the times in the foregoing bill mentioned, the president of the Continental Bank, complainant in said bill, and as such had general charge of its business, and that he has read the foregoing bill and knows the contents thereof; that the said bill is true of his own knowledge, except as to those matters as are therein stated to be on his information and belief, and as to those he believes it to be true.

T. B. EDGAR.

Subscribed and sworn to this 19th day of February, A. D. 1874, by said affiant before me at office, in St. Louis, Missouri.

12 F. A. WERNER,
*Comm'r U. S. Circuit Court Eastern Dist. Missouri.*

And the subpœna in chancery issued, together with the marshal's return thereon endorsed, is as follows, to wit:

*Subpœna.*

EASTERN DISTRICT OF MISSOURI, *ss:*

The President of the United States to Frederic W. Biebinger, assignee in bankruptcy of Yaeger & Co., greeting:

You are hereby commanded to be and appear at rules to be held at the office of the clerk of the circuit court of the United States for the eastern district of Missouri, on the first Monday of April next, at the city of St. Louis, then and there to answer the bill of complaint of the Continental Bank, a corporation created by and existing under the laws of the State of Missouri, and a citizen of said State of Missouri, filed against you on the nineteenth day of February, 1874; hereof fail not.

Witness the honorable Morrison R. Waite, Chief Justice of the United States, the nineteenth day of February, 1874. Issued at office, in the city of St. Louis, under the seal of said court, the day and year last aforesaid.

[L. S.] AUSTIN DRAKE, *Clerk*,
By H. C. GEISBERG, *Deputy*.

13 Mem: The defendant to enter his appearance in this suit in the clerk's office on or before the day at which the writ is returnable, otherwise the bill may be taken pro confesso.

AUSTIN DRAKE, *Clerk*,
By H. C. GEISBERG, *Deputy*.

*Return.*

UNITED STATES OF AMERICA,
*Eastern District of Missouri, ss:*

Executed this writ by delivering a copy of the same, together with a copy of the petition, to the within-named F. W. Biebinger, assignee, at St. Louis, within the eastern district of Mo., February 23d, 1874.

C. A. NEWCOMB,
*U. S. Marshal, E. D. Mo.,*
By J. SAUER, *Dep'ty.*

And afterwards, to wit, on the sixth day of April, 1874, the defendant filed the following plea to the jurisdiction of the court, to wit:

*Plea, &c.*

CONTINENTAL BANK, COMPLAINANT,
*ag't*
F. W. BIEBINGER, ASSIGNEE OF YAEGER & Co., respondent.

In the circuit court of the United States for the eastern district of Missouri.

And now comes the respondent herein and files this his plea to the jurisdiction of this honorable court to hear and determine said cause, for reasons: 1st. The parties, complainant and respondent, are all
14 residents of the State of Missouri, or local corporations located & doing business exclusively in said State; 2d. Because the land in controversy is in another State & not within the jurisdiction of this court, & this court, therefore, has no power or right to grant any decree respecting the same as prayed.

SLAYBACK & HAUESSLER,
*Deft's Att'ys.*

UNITED STATES OF AMERICA,
*Eastern District of Missouri, set:*

Fred. W. Biebinger, respondent herein, being duly sworn, deposes & says that the facts as stated in the within plea are true in point of fact & it is not interposed for delay.

F. W. BIEBINGER.

Subscribed & sworn to before me, this 7th day of April, A. D. 1874.
[L. S.]
C. O. BISHOP,
*Notary Public, St. Louis Co., Mo.*

I hereby certify that, in my opinion, the within plea is well founded in point of law.

B. D. LEE,
*Counsellor.*

And afterwards, on the 16th day of April, 1874, the following appears of record in said cause, to wit:

CONTINENTAL BANK, PLAINTIFF,
*vs.*
F. W. BIEBINGER, ASSIGNEE, &C., DEFENDANT. } In chancery.

15 This day comes the defendant, by his solicitor, on whose motion this cause is set down for hearing instanter, on the plea to the

jurisdiction heretofore filed by said defendant; thereupon said plea was argued by said solicitor, and submitted to the court.

And afterwards, on the 18th day of April, 1874, the said defendant filed the following additional plea to the jurisdiction of the court, to wit:

*Plea.*

CONTINENTAL BANK, COMPLAINANT,
*ag't*
FREDERICK W. BIEBINGER, ASSIGNEE OF Henry C. Yaeger & John Crangle, respondent.

In the United States circuit court in & for the eastern district of Missouri.

And the said respondent, in his own proper person, comes and says that this hon'l court ought not to have or take further cognizance of the action aforesaid, because he says:

1st. That the said cause of action has been instituted by complainant without having first obtained any leave from this honorable court so to do.

2d. That the lands the title to which is sought to be effected, & which it is attempted to absolutely bar and foreclose his right, are situate out of this district, to wit, in the southern district of Illinois.

3d. That complainant is a corporation created under and by the laws of the State of Missouri, and as such a citizen of said State, and
16 that respondent is also a citizen of said State, and this the said defendant is ready to verify, wherefore he prays judgment whether the court can or will take further cognizance of the action aforesaid.

FRED'K W. BIEBINGER,
*Assignee of Henry C. Yaeger & John Crangle, Bankrupts.*

HERMAN A. HAUESSLER,
*Attorney.*

UNITED STATES OF AMERICA,
*Eastern District of Missouri, ss:*

Frederick W. Biebinger, respondent herein, being duly sworn, deposes and says that the above plea is not interposed for delay, and that it is true in point of fact.

FRED'K W. BIEBINGER.

Sworn to and subscribed before me this 18th day of April, 1874.
[L. S.]
J. S. GARLAND,
*Notary Public, St. Louis County, Mo.*

I hereby certify that, in my opinion, the above plea is well founded in point of law.

A. W. SLAYBACK,
*Of Counsel for Respondent.*

And afterwards, on the 6th day of June, 1874, the following appears of record in said cause, to wit:

CONTINENTAL BANK, PLAINTIFF,
*vs.*
F. W. BIEBINGER, ASSIGNEE, &C., DEFENDANT. } In chancery.

17 The court having considered the plea to the jurisdiction of this court, heretofore filed by this defendant, and being now fully ad-

*Return.*

UNITED STATES OF AMERICA,
*Eastern District of Missouri, ss:*

Executed this writ by delivering a copy of the same, together with a copy of the petition, to the within-named F. W. Biebinger, assignee, at St. Louis, within the eastern district of Mo., February 23d, 1874.

C. A. NEWCOMB,
*U. S. Marshal, E. D. Mo.*,
By J. SAUER, *Dep'ty.*

And afterwards, to wit, on the sixth day of April, 1874, the defendant filed the following plea to the jurisdiction of the court, to wit:

*Plea, &c.*

CONTINENTAL BANK, COMPLAINANT,
*ag't*
F. W. BIEBINGER, ASSIGNEE OF YAEGER & Co., respondent.

In the circuit court of the United States for the eastern district of Missouri.

And now comes the respondent herein and files this his plea to the jurisdiction of this honorable court to hear and determine said cause, for reasons: 1st. The parties, complainant and respondent, are all
14 residents of the State of Missouri, or local corporations located & doing business exclusively in said State; 2d. Because the land in controversy is in another State & not within the jurisdiction of this court, & this court, therefore, has no power or right to grant any decree respecting the same as prayed.

SLAYBACK & HAUESSLER,
*Deft's Att'ys.*

UNITED STATES OF AMERICA,
*Eastern District of Missouri, sct:*

Fred. W. Biebinger, respondent herein, being duly sworn, deposes & says that the facts as stated in the within plea are true in point of fact & it is not interposed for delay.

F. W. BIEBINGER.

Subscribed & sworn to before me, this 7th day of April, A. D. 1874.
[L. S.]
C. O. BISHOP,
*Notary Public, St. Louis Co., Mo.*

I hereby certify that, in my opinion, the within plea is well founded in point of law.

B. D. LEE,
*Counsellor.*

And afterwards, on the 16th day of April, 1874, the following appears of record in said cause, to wit:

CONTINENTAL BANK, PLAINTIFF,
*vs.*
F. W. BIEBINGER, ASSIGNEE, &C., DEFENDANT. } In chancery.

15 This day comes the defendant, by his solicitor, on whose motion this cause is set down for hearing instanter, on the plea to the

jurisdiction heretofore filed by said defendant; thereupon said plea was argued by said solicitor, and submitted to the court.

And afterwards, on the 18th day of April, 1874, the said defendant filed the following additional plea to the jurisdiction of the court, to wit:

*Plea.*

CONTINENTAL BANK, COMPLAINANT,
*ag't*
FREDERICK W. BIEBINGER, ASSIGNEE OF
Henry C. Yaeger & John Crangle, respondent.

In the United States circuit court in & for the eastern district of Missouri.

And the said respondent, in his own proper person, comes and says that this hon'l court ought not to have or take further cognizance of the action aforesaid, because he says:

1st. That the said cause of action has been instituted by complainant without having first obtained any leave from this honorable court so to do.

2d. That the lands the title to which is sought to be effected, & which it is attempted to absolutely bar and foreclose his right, are situate out of this district, to wit, in the southern district of Illinois.

3d. That complainant is a corporation created under and by the laws of the State of Missouri, and as such a citizen of said State, and
16 that respondent is also a citizen of said State, and this the said defendant is ready to verify, wherefore he prays judgment whether the court can or will take further cognizance of the action aforesaid.

FRED'K W. BIEBINGER,
*Assignee of Henry C. Yaeger & John Crangle, Bankrupts.*

HERMAN A. HAUESSLER,
*Attorney.*

UNITED STATES OF AMERICA,
*Eastern District of Missouri, ss:*

Frederick W. Biebinger, respondent herein, being duly sworn, deposes and says that the above plea is not interposed for delay, and that it is true in point of fact.

FRED'K W. BIEBINGER.

Sworn to and subscribed before me this 18th day of April, 1874.
[L. S.]
J. S. GARLAND,
*Notary Public, St. Louis County, Mo.*

I hereby certify that, in my opinion, the above plea is well founded in point of law.

A. W. SLAYBACK,
*Of Counsel for Respondent.*

And afterwards, on the 6th day of June, 1874, the following appears of record in said cause, to wit:

CONTINENTAL BANK, PLAINTIFF,
*vs.*
F. W. BIEBINGER, ASSIGNEE, &C., DEFENDANT. } In chancery.

17 The court having considered the plea to the jurisdiction of this court, heretofore filed by this defendant, and being now fully ad-

vised in the premises, it is ordered that said plea be overruled, and leave is granted said defendant to file his answer to the bill of said plaintiff on or before the first Monday of July next.

And afterwards, on the 30th day of June, 1874, the said defendant filed the following answer, to wit:

*Answer.*

In the circuit court of the United States in & for the eastern district of Missouri.

CONTINENTAL BANK
*vs.*
FREDERICK W. BIEBINGER.

The answer of Frederick W. Biebinger, defendant, to the bill of complaint of the Continental Bank.

This defendant, now and at all times hereafter saving and reserving unto himself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said complainant's said bill of complaint contained, for answer hereto, or unto so much and such parts thereof as this defendant is advised is or are material or necessary for him to make answer unto, this defendant for answer saith: It is not true that the petitioner, for the purpose of securing itself from loss on account of alleged advances to Yaeger & Co., required of them that they should deposit
18 with petitioner collateral security for advances and discounts made or to be made for them by petitioner. Deny that, in compliance with said alleged requirements, said Yaeger & Co. did, in the winter of A. D. 1867, deposit with petitioner, as collateral security for such alleged advances and discounts made or to be made to them, two negotiable promissory notes, each for the sum of twenty thousand dollars, bearing dates, one of the 23d day of March, 1867, made by C. Harryman & Co., payable on or before two years after said date to the order of said Yaeger & Co., and by them endorsed, bearing interest after maturity at the rate of ten per centum per annum, and secured by a deed of trust on the real estate in the petition described, and the other bearing date the 26th day of September, 1866, made by C. Weiche & Co., payable one year after date to the order of themselves, and by them endorsed, bearing interest from date at the rate of ten per centum per annum, payable semi-annually, and secured by certain other real estate situated in said county of Washington, State of Illinois.

Denies that after the deposit alleged the petitioner to do business with said Yaeger & Co., or that it did, from time to time, advance them large sums of money, or any amount whatever, on the faith
19 thereof; denies that on or about the 11th day of February, 1871, or at any time, Yaeger & Co., being then indebted to complainant in a sum exceeding the sum of forty thousand dollars, the said notes were deposited as collateral security. Denies that being so as alleged deposited as collateral security, the said Yaeger & Co. applied to complainant for leave to take said notes and deeds of trust, or that he stated to the officers of the petitioner having charge of its business that it was necessary for them to have the said notes and deeds of trust securing the same, in order that the collection of said notes might be enforced, or that the title to said real estate might be made absolute in said Yaeger

& Co., by foreclosure and sale under said deeds of trust for the benefit of complainant. Denies that thereupon, as alleged, upon the faith of such representations, and of the written agreement of said Yaeger & Co., the said notes and deeds of trust were entrusted to the possession of said Yaeger & Co., for the puposes aforesaid only. Denies that in and by said agreement of Feb. 11th, 1871, the said Yaeger & Co. promised and agreed that in case they, the said Yaeger & Co., should not return the said notes and deeds of trust, alleged to have been entrusted to their possession, within a reasonable time, they would replace them by other collateral securities of equal value, to be approved by the petitioner; and denies that in part performance of any such alleged
20 agreement they did deposit the master's deed for said real estate with petitioner. Denies that petitioner sent the said Yeager & Co. the said master's deed with the distinct understanding, expressed at the time, or at any time, or written on the envelope containing such deed, that petitioner parted with possession of said deed simply for the purpose of having said Yaeger & Co. and the wives of said members of said firm sign and execute a deed of mortgage to petitioner, upon said real estate. Denies that the said Yaeger & Crangle, or either of them, agreed to so execute such mortgage, or that they expressed themselves satisfied with the terms of the instrument, which petitioner avers it caused to be prepared. Denies that petitioner shows to the court true or certified copy of said master's deed, or that the original is lost, in the manner alleged, or mislaid, or that the same has been searched for, or that Yaeger & Co. alleged that all the papers in their possession relating to said property had been by them placed in the hands of their attorney. Denies that over and above the sums heretofore realized on acceptances and collaterals which the petitioner did have, the said Yaeger & Co. are indebted to the petitioner in a sum exceeding thirty thousand dollars, for which petitioner has no other security.
21 Denies that the facts stated create or give any lein or mortgage on the real estate described in the petition, and denies that the said verbal agreements alleged are binding, but the same are wholly void under the statute of frauds, requiring all agreements touching the title or conveyance of real estate to void unless reduced to writing, and signed and acknowledged by the parties to be bound thereby. Denies that the alleged writing of Feb. 11th, 1871, gave to the petitioner the title to, or any lien, either at law or in equity, to the exclusion of other creditors of said Yaeger & Co., who were not and are not charged with being parties cognizant of the alleged representations. Denies that petitioner is entitled to any advantage over any other creditor or creditors who were promised security without actually obtaining it. Denies that the petitioner is in any manner entitled to the relief, or to the several orders and judgments, decrees and other things prayed for. Denies that this defendant of right ought to sell such real estate for the purpose of applying the proceeds in the manner prayed.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith he is charged by said bill, without this, that there is any other matter, cause or thing in the said complainant's said bill of complaint contained material or necessary for this defendant to make answer unto and not herein and hereby
22 well and sufficiently answered, confessed, traversed, and avoided or denied, is not true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain, and prove, as this honorable court shall direct, and

humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

FRED'K W. BIEBINGER.
*Defendant.*

SLAYBACK & HAUESSLER,
*Solicitors for Defendant.*

And afterwards, on the 9th day of September, 1874, the plaintiff filed the following replication, to wit:

In the circuit court of the United States for the eastern district of Missouri. In chancery.

*Replication.*

CONTINENTAL BANK, COMPLAINANT,
*vs.*
FREDERICK W. BIEBINGER, assignee of Yaeger & Co., defendant.

The replication of the Continental Bank, complainant, to the answer of Frederick W. Biebinger, assignee of Yaeger & Co., defendant.

This repliant, saving and reserving to itself all and all manner of exceptions which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the said defendant,
23 for replication thereunto, saith, that it doth and will aver, maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive, and insufficient in the law to be replied unto by this repliant, without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain, and prove, as this honorable court shall direct, and humbly prays as in and by its said bill it has already prayed.

By HITCHCOCK, LUBKE, & PLAYER,
*Its Solicitors.*

And afterwards, at the September term, 1875, of said court, and on the 28th day of October, 1875, this cause coming on to be heard, the following proceedings were had, to wit: It was admitted that Yaeger & Crangle, on July 24th, 1873, made a voluntary assignment of all their property unto E. D. Jones, and others, who again assigned all their rights under said deed to defendant as assignee as aforesaid; that on October 13, 1873, a petition was filed against Yaeger & Co., in the eastern district of Missouri, on which they were afterwards duly adjudged bankrupts by the district court of the United States for said district, and defendant elected their assignee.

24 The complainant then read the receipt, filed as follows:

*Receipt.*

Whereas the subscribers being indebted to the National Loan Bank of St. Louis, to a considerable amount in notes and sundry dratts, and

having given to said National Loan Bank the following described notes secured by deed of trust, to secure the said bank against any loss, to wit:

1st. Note of C. Weihe & Co., for twenty thousand dollars, payable one year after the 26th day of September, 1866, with ten per cent. interest from date.

2d. Note of C. Harryman & Co., for twenty thousand dollars, payable two years after March 23, 1867, with ten per cent. interest after maturity.

Now whereas the said National Loan Bank, at the request and desire of said Yaeger & Co., having delivered up to said Yaeger & Co. the above-described notes for the purpose of disposing of them, it is hereby agreed by said Yaeger & Co., that in case they should not return these above-mentioned notes to the National Loan Bank within a reasonable time, the said Yaeger & Co. hereby agree to replace them by other collateral securities of equal value, to be approved by the said National Loan Bank.

S't Louis, M'o, 11th February, 1871.

YAEGER & CO.

Witness:

EMILE KARST.

[5-cent U. S. rev. stamp.]

*Deposition of T. B. Edgar.*

The complainant thereupon offered the evidence of one T. B.
25 Edgar, as follows:

Q. Give your full name.

Ans. Timothy B. Edgar.

Q. What is your present business?

Ans. I am in the banking business.

Q. What bank are you now connected with?

Ans. The Continental Bank.

Q. Has that bank always borne that name?

Ans. No, sir; it was incorporated under the name of the National Loan Bank.

Q. About what time was the name changed?

Ans. June, 1873.

Q. How long have you been connected with that bank?

Ans. Since its organization.

Q. Did you know the firm of Yaeger & Co.?

Ans. Yes.

Q. Who composed that firm?

Ans. Henry C. Yaeger and John Crangle.

Q. When did you first know of the firm of Yaeger & Co.?

Ans. I think I have known them probably since as early as 1866, maybe prior to that; I am not positive as to the time.

Q. In what business were they engaged?

Ans. In the milling business.

Q. Did they ever have any business transaction with your bank?

Ans. Yes, sir.

Q. Do you remember about the time when these transactions commenced?

26 Ans. Well, I do not remember as to the time.

Q. Approximately.

Ans. I think it was in 1867 they commenced to do business with us.

Q. How long did they continue to do business with your bank?

Ans. They continued to do business from that time until up to or pretty near to the time of their failure, their bankruptcy.

Q. What were the nature of the transactions with you?

Ans. I would state there might be times in the time I mention, from 1867 to the time of their bankruptcy, when they fell off for a time and did not do business; but that was the time they commenced and the time they closed.

Q. Through the greater part of that time they did business there?

Ans. Yes, sir.

Q. What was the nature of the business transactions you had between you?

Ans. The bank loaned them money and took their bills, discounted their bills and notes in the usual way of banking business.

Q. Were they depositors with you also?

Ans. Yes, sir; they had an account with us.

Q. What was the extent of your business transactions? State whether they were large or small.

Ans. At times the business transactions were large.

27 (Counsel for defendant objected, and asked the witness to state what they were, and let the court pass on that question.)

Witness. I think their account run from $25,000.00 to $125,000.00 at various times. That is the way I recollect the account run. I don't think it was over $125,000.00, and I think it run from that down to $25,000.00.

Q. Do you remember whether, in the course of your business transactions with Yaeger & Co., they ever made a deposit of collaterals with the bank?

Ans. Yes, when I found their liabilities were running up to a large amount, or some $50,000.00, and over, I then suggested to the board of directors of the bank that we take security.

(Counsel for defendant objected to the witness stating anything he suggested.)

Q. What took place between Yaeger & Co.?

Ans. I said to Yaeger & Co.——

By Mr. HAUESSLER. Which one, if you please?

Ans. Yaeger; there was but one Yaeger connected with the house that I know of.

Q. State all you said to Mr. Yaeger.

Ans. I said to Mr. Yaeger they would have to deposit some collaterals with the bank before we could extend their line of discounts.

Q. Do you remember about what time this was—about how long after they commenced to do business with you?

28 Ans. I think that was probably in the course of the second year; somewhere about the second year after they commenced doing business with us.

Q. Did they take any action in pursuance of your suggestion?

Ans. Not at once, and we declined discounting for them.

Q. Did they afterwards?

Ans. Some time afterwards they did make a deposit with us of two notes of $20,000.00 each, which notes Mr. Yaeger stated were secured by a deed of trust on a certain mill property in Illinois.

Q. Do you remember the county in Illinois?

Ans. I think it was Washington County, if I mistake not.

Q. Do you remember whether the deeds of trust were deposited with the notes?

Ans. Yes, sir.

Q. After the deposit of these collaterals did you continue to do business with them?

Ans. Yes, sir; we continued to do business with them.

Q. How long did these collaterals remain with you; the collateral notes and deeds of trust?

Ans. I can't recollect the time; they remained, though, I should think, for some two or three years in all.

Q. What became of them at the end of that time?

Ans. Well, sir, Mr. Yaeger came in the office and desired the bank to allow him to take them, in order——

29 (Counsel for defendant objected to the witness stating anything about the desires of the parties, but requests him to state what was said.)

WITNESS. He asked if he could not take these notes.

Q. Meaning the collateral notes?

Ans. The collateral notes which were deposited there to secure the money which they had borrowed, and were borrowing at the time.

Q. Did he give any reason for your allowing him to take the notes?

Ans. I objected to his taking the notes without leaving other collaterals in their place. On his assuring me, however, that he desired to foreclose the mortgage, or he could sell the property, he said, or foreclose the mortgage. I think he stated he could sell the property, and that whatever he got when he sold the property and got the money, that whatever change was made he would bring the security to the bank and the bank would remain the same. With that understanding I gave him the papers and notes.

Q. Do you know whether any written agreement was made by Yaeger & Co. at the time they withdrew the papers from you?

Ans. Yes, sir; I think there was a written agreement made.

Q. Do you refer to the one mentioned in the bill as being dated February, 1871?

(Counsel for defendant objected to the question, and asked that the papers be produced.)

30 Ans. I objected to giving the notes up till he gave a written agreement, and I think that will show for itself.

Q. Do you know that one was given?

Ans. Yes, I know we had it filed in lieu of the collaterals with the papers of the bank.

Q. Do you remember whether Yaeger & Co. were indebted to the bank when they withdrew those collaterals?

Ans. Yes, sir.

Q. Can you state about the amount?

Ans. I think it was from $50,000.00 to $75,000.00, I think they were liable for that amount. We took their drafts with other parties' names and held them liable, as they were the parties that received the money from us.

Q. After you delivered these collaterals to Yaeger & Co., did they ever return them or any other securities in the place of them?

Ans. Yes, sir; they placed a deed, as I understood Mr. Yaeger when he gave it to me, which was a deed for the property on which the real-estate notes were, a deed of the master in chancery, or something of the kind.

Q. A deed to whom?

Ans. The deed was to Yaeger & Crangle.

Q. You say he deposited this with you?

Ans. Yes, sir; saying that conveyed as he understood the property

and was the same collateral security which I had before, except that it was in the shape of a deed to the property in Illinois in lieu of the notes.

In looking over the paper, however, in examining the deed or pa-
31 per some time after, and on consultation we thought the bank's interest would be better secured by a mortgage on the different parcels or pieces of real estate. I mentioned the matter to Mr. Yaeger and he consented to have the papers drawn up in any way our attorneys should suggest to secure our interests there as collateral for the money he wished to borrow. He requested our attorneys to draw up the papers and some time elapsed before they were completed.

Q. Who was your attorney?

Ans. M. L. Gray.

Q. Did he draw up this paper you mentioned?

Ans. Yes sir; I showed the papers to M'r Yaeger after M'r Gray had brought them in, and he said he would take them and execute them, and have his wife execute them, or the wives of the partners execute them, and return them.

Q. That was the deed of trust or mortgage?

Ans. Yes, sir; and in the mean time we held the other deed, the master's deed, as collateral until these should be executed.

Q. Were they executed?

Ans. No. Shortly after that Yaeger & Co. got in trouble, and though they promised to bring in the papers they did not do it, and the matter fell through; M'r Yaeger always seemed to be anxious that this deposit of collateral security should be there with the bank, and as he says, supposed it was there all the time.

32 Q. Do you remember about the time that this master in chancery's deed was deposited with the bank?

Ans. I think it was in 1872 sometime, early or late. I think, if I am not mistaken, it was late in 1872; the latter part of the year, I think.

Q. Do you remember for which one of the mills it was a deed?

Ans. It was what they call the O'Kaw mill.

Q. Where is this master in chancery deed you spoke of?

Ans. I really don't know where it is. My impressions were that I gave it to M'r Hauessler. I think I gave it to him or one of the members of the firm.

Q. What firm?

Ans. Yaeger & Co.; the former firm of Yaeger & Co.

Q. Will you state the circumstances under which you gave it to the person you did hand it to?

Ans. Well, it was stated to me that they wanted to compare the description of the property, as I understood it, with these papers we had already made out, which were in the hands of Yaeger & Co.

Q. You wanted to compare the description in the deed that had been drawn up, with what?

Ans. With the description in the deed of the master in chaucery, to see if they agreed, and I consented for them to take it for that purpose, with the understanding it was to be returned to me or the deed of trust, and I think there was a memorandum made on the envelope which covered the deed to that effect. There was a memorandum made on
33 it at that time so the parties could see the condition on which we held it. I think there was a memorandum made in pencil on the envelope.

Q. Do you remember who made the memorandum?

Ans. Yes, sir; M'r L. Gray. I hesitated about giving the paper, as we considered that paper our security. On a former occasion we did not

let the paper go without a written agreement. In this case, it was M'r Hauessler, or some one sent an order, I think, for it, and I hesitated, and M'r Gray happened to be present in the office and wrote a memorandum on the envelope which contained the deed, and in that way it was given. I made an effort to get—and it was either lost or mislaid. I called on M'r Hauessler and he referred me to the assignee, M'r Biebinger, perhaps, and I called on him and he had no recollection of it, or could not find it at the time. I made no further effort to find it.

Q. Were Yaeger & Co. indebted to your bank at the time they failed?

Ans. Yes, sir.

Q. In about what amount, approximately?

(Counsel for defendant objected to the question.)

Q. State, as near as you can, the amount.

Ans. $50,000.00. At least, their name was on paper to that amount with other parties—bills drawn on various parties; I think they were liable.

Q. Did you have any collateral or acceptances of Yaeger & Co. at the time they failed?

34 Ans. I had no collateral, except these collaterals, which we supposed were good; and we had their bills which we discounted. We had the names of the parties on which they had been drawn; in some instances we had not, as there had not sufficient time elapsed for them to reach the parties for them to accept.

Q. Have you realized anything on these bills?

Ans. On some of them we have. They drew on many different parties, and some have been met and paid, but I think the larger amount has not been.

Q. After deducting the amount taken from these acceptances, about what do Yaeger & Co. still owe you?

(Counsel for defendant objected to the question as incompetent for the reason the only proper way to get at the indebtedness is for the witness to state what particular amount is owing to them, and to show some accounting to show what is due.)

Q. State, as near as you can, what it is.

Ans. They owe us not less than $35,000 or $40,000.00.

Q. Do you remember what became of that deed of trust or mortgage that M'r Gray drew?

Ans. I think, I am not positive, that we have it. I think that M'r Yeager or some one sent it. I am not positive how it got in our possession.

Q. It did come into your possession?

Ans. Yes, sir.

Q. Do you recollect whether you gave it to us?

35 Ans. No; I don't recollect what became of it. The last I saw of the paper I think I gave it to M'r Yaeger, and he promised to have it executed and returned to the bank.

Cross-examination:

Q. At the time of this deposit, as you claim, what was Yaeger & Co.'s line?

Ans. Well it was some $50,000.00 or $75,000.00

Q. In what, discounts, drafts, or what?

Ans. In discounts, notes and drafts.

Q. Was Mr. Yaeger a stockholder in the bank?

Ans. I think he owned some stock in the bank, I am not positive whether he was a stockholder at that time; I don't think he was at the time of the deposit you allude to.

Q. Was he at the time you say the collaterals were withdrawn?

Ans. Yes, sir, I think he was.

Q. At that time who held the stock, Mr. Yaeger or the bank?

Ans. Mr. Yaeger never paid the stock up, we held the stock as security. That was a separate affair. We kept the thing a little different from the bills.

Q. Please give the drawers, or makers, endorser and acceptor and amount of every piece of paper the bank held against Mr. Yaeger, or Yaeger & Co., at the time the deposit was made?

Ans. My memory would not allow me to do that. It is utterly impossible for me to do that. They were drawn on forty or fifty different parties.

Q. If you can't give it, please state it?

Ans. I do state it.

36 Q. Please give a similar statement of any paper you held against Yaeger & Co., at the time you say the securities were withdrawn.

Ans. I would refer you to the books of the bank. I can't give them from memory.

Q. We have no right to take the books of the bank in court. You say an amount was due, and I want the particulars?

Ans. I say the amount is due, and if you want any other particulars you can have them.

Q. I ask the question and you can say you will give it, or you won't give it?

Ans. What is the question.

Q. The makers of them, and endorsers of them, the acceptors and amount of them?

Ans. I am entirely unable to recollect the names of all the parties with whom Yaeger & Co., had business.

Q. You have no memorandum by which you can get at it, and furnish it to the notary?

Ans. It is on the books of the bank.

Q. Do you know anything about the books of the bank?

Ans. I have a general knowledge of them.

Q. Can't you make out such a statement?

Ans. There can be such a statement made out, and I have no doubt there has been.

Q. Will you make out such a statement and furnish it to the notary?

Ans. I can do so.

Q. Will you do so?

37 Ans. If required to.

Q. If required to by whom?

Ans. The authorities that have the power. The court has the power.

Q. Can you furnish a similar statement of all papers you held at the time of the failure of Yaeger & Co., and which you now hold?

Ans. Yes, sir.

Q. Will you furnish it?

Ans. Yes, sir, we will furnish it—the bank will furnish it.

Q. When paper is taken by the bank, what process does it take in order to have that discounted for the customers, please state that and explain it?

Ans. It goes before the board of directors.

Q. The board meets at what time?

Ans. They usually meet at twelve o'clock.

Q. All paper is submitted to the board for discount?

Ans. No, sir; not all.

Q. What class is not submitted to them for their approval?

Ans As a general thing the officers of the bank pass on sight-bills, and all others go before the board as a general thing. There are exceptions, however.

Q. Did you ever take any paper except sight bills or drafts drawn by Yaeger & Co., on customers of theirs, without having some security, or an endorser outside of any collaterals you held?

38 Ans. I am not aware that we have ever taken any paper of Yaeger & Co., without having, as we supposed, ample security.

Q. In what shape?

Ans. Endorsers and collaterals placed in the bank to provide for any parties where they refused or declined to pay their drafts, and collaterals were held for that purpose.

Q. And collaterals were held for any drafts which should come back unpaid.

Ans. Yes, sir, or where they would draw on parties who would refuse to accept, which was often the case.

Q. What, if any portion of the paper you held against Yaeger & Co., at the time these securities were withdrawn, is still due to your bank, if any?

Ans. I think there is some $20,000 or $30,000.00.

Q. There is still $20,000 or $30,000 that you held in 1872 that you still hold?

Ans. I don't know that it was exactly paper of 1872.

Q. Have you got any paper against Yaeger & Co. that was dated in 1872?

Ans. We renewed it from time to time.

Q. Have you got any paper dated in 1872, either made by Yaeger & Co., or endorsed by Yaeger & Co.,?

Ans. I think we have. I will state here that this collateral, as so stated at the time, was intended for future business as well as past.

39 Q. I did not ask you about that, I ask you to answer my questions.

Ans. You asked me about this collateral; what was due at the time the collateral was given.

Q. I am simply asking you if you hold any paper dated in 1872?

Ans. That is your question, but I alluded to a former question.

Q. At the time these papers were left with you, as you say, as collaterals, was there any written agreement or any written paper assigning the papers to you; and, if so, where is it and what is it?

Ans. We don't usually require it.

Q. Was it or was it not; I don't care what you usually do; I am not asking you for a custom?

Ans. I supposed you wanted it answered in a sensible way.

Q. It is a plain question.

Ans. No; we held the agreement in the notes; the notes we considered the agreement.

Q. All he did, then, was to simply deliver the deed of trust and notes?

Ans. Yes, sir; that was all we wanted.

Q. Was there any record made of the transaction in the record of the bank?

Ans. I reported to the board of directors that he gave security for $40,000.00.

Q. Will you please furnish a copy of the resolution of the bank?

Ans. There was no resolution.

40 Q. Is there anything on record to show it?

Ans. No; I think not. I reported that Yaeger & Co. had deposited $40,000.00 in collateral security of notes to apply to his line of discount, as collateral security on his line of discount.

Q. At the time of the failure of Yaeger & Co., was their line of discount larger than it was at the time you received the collateral notes, as you say?

Ans. I am not able to say whether it was larger or not. He generally had a line of $75,000.00 to $100,000.00.

Q. You imagine it was about the sum?

Ans. Yes.

Q. It had not been increased in any way?

Ans. No, as long as he kept the $40,000.00 there, we told him we would give him a line of $75,000.00 to $100,000.

Q. And before you had the notes you had done the same?

Ans. No; before he gave the collateral we shut down.

Q. You say at the time the collaterals were deposited their line was not as much as at the time they failed?

Ans. No, I don't say that; my impression is the line was drawn down some previous to the failure. The bank had been in the habit of giving them $75,000 00 to $100,000.00, but previous to giving the collateral security it had been the instruction of the board to shut down on them, as far as discounts were concerned.

41 Q. The paper you allude to as having been signed by Yaeger & Co., at the time the notes were delivered, was the only paper that was signed, was it not?

Ans. I don't recollect of any other.

Q. It is all you can remember of ever having seen or heard of, is it not?

Ans. There may have been other papers with the cashier, but I don't recollect them.

Q. Who drew the papers?

Ans. I think Mr. Karst, the cashier, drew them.

Q. When did you first give this deed of trust, or mortgage, to Mr. Yaeger to execute; before or after you heard of his failures?

Ans. Before.

Q. Did he have the deed at the time of the failure, or was it in your drawer at the bank, at the time of the failure—the deed that Mr. Gray drew?

Ans. I think he had it.

Q. Was it not in your drawer when Mr. Yaeger and myself called on you, and did not you take it out and show it to us?

Ans. Not at that time.

Q. The original deed of trust which you wanted Mr. Yaeger to sign before you would sign the agreement with the creditors to give them an extension?

Ans. No, I mentioned at the time when they asked me to sign—I mentioned the paper had not been executed, but I don't recollect of the papers being in the desk.

42 Q. Did Mr. Yaeger ever have the paper before you desired it to be signed—before you would sign the agreement with the creditors?

Ans. He had it before I knew of his failure.

Q. Had he ever had it before you showed it to me?

Ans. I don't recollect of showing it to you at all.

Q. Did you ever discount any note for Yaeger & Co., unless there was

an indorser on the paper, or some other party as maker on it, outside of drafts drawn by them on customers?

Ans. Except in the case of the stock, I think not. We took notes on the stock as collateral.

Q. You always insisted on two names on the paper?

Ans. Yes, sir.

Q. Did not all such paper go before the board as a matter of fact?

Ans. Not in all cases; it generally did.

Q. Can you recite an instance of any piece of paper you hold now, where you took it without laying it before the board?

Ans. No, I cannot; there are too many of them.

Q. You signed the general agreement for the extension of Yaeger & Co.?

(Counsel for complainant objected to the question on the ground the papers will speak for themselves.)

Ans. I signed it on conditions.

Q. You are the party that signed "T. B. Edgar, President National Bank" to that paper?

Ans. Yes, sir; the condition over the signature states——

43 Q. You have never proved your claim in bankruptcy against the estate?

Ans. I really don't know whether it has been proved.

Q. Do you know anything about the indebtedness of Yaeger & Co. to the Continental Bank, or National Loan Bank, except what you see on the books of the bank?

Ans. Yes, sir, I know from my own personal knowledge.

Q. You can't now remember what was due at certain times to the bank without referring to the books?

Ans. I can't remember the precise figures, but I have a pretty good idea of the general amount.

Q. You have owned a good deal of real estate and sold it?

Ans. I have some.

Q. You know what is necessary in order to make a proper transfer of the title of land?

(Counsel for complainant objected to the question as irrelevant, that the law shows for itself what is necessary.)

Ans. I believe I do.

Q. You know the title to land does not pass by a deed being made and deposited?

(Counsel for complainant objected to the question as calling for the witness' opinion on a question of law.)

Ans. I do not.

Re-examination.

Q. These notes that were originally deposited by Yaeger & Co., with the deed of trust as collateral, for their accounts, were they not endorsed so they passed by delivery?

(Counsel for respondent objected to the question as not growing out of the cross-examination, and also on the ground that the notes will show for themselves.)

44 Ans. Yes, sir, they were endorsed.

Q. Do you know where those notes are now?

Ans. No, sir, I do not.

Q. The last you saw of them, they were delivered by you?

Ans. Yes, sir.

(The respondent at the time objected to all evidence in regard to what

was said or done in regard to the withdrawal of the securities which complainant had held, on the ground that they were irrelevant and incompetent, as the writing which was finally executed was the best evidence of the contract, and in it were merged all verbal arrangements and propositions. The court overruled all objections. The defendant also objected to the evidence offered in regard to the deposit of the master's deed, and what took place between the bank and its attorney, and how they regarded the deed. The court overruled all the objections, and defendant excepted at the time.)

The complainant then read the testimony of Emile Karst, as follows, to wit:

EMIL KARST.

Q. State your name and business?

Ans. Emile Karst, cashier of the Continental Bank of St. Louis.

Q. How long have you been connected with that bank?

Ans. From the first day of its opening business.

Q. About what year was it?

Ans. I think it was in April, 1866.

45 Q. Do you know the firm of Yaeger & Crangle?

Ans. Yes sir.

Q. How long have you known that firm?

Ans. I have known of them before they commenced to do business with us. I knew of them when I was cashier of a bank in Belleville in 1864; I knew of there being such a firm.

Q. When did they commence to do business with your bank here?

Ans. I think it was in the fall of the year 1867, but I would not be very positive of the time of year. It was in 1867 some time.

Q. And how long did they continue to do business with the bank?

Ans. Until they failed, that is, off and on. I would say there was one time when we refused to lend them any more money, because of certain papers which they had given us as collateral security were not returned. We had some collateral securities, which at one time they carried away, and when they did not return them we cut off their supply. They owed us nothing at one time, I think somewhere in the summer and fall of 1871.

Q. I will ask you when they first made a deposit of collateral with your bank?

Ans. I think at the time they borrowed their first money, in the fall of 1867. I think so.

Q. What did this collateral consist of that they deposited?

Ans. There were two notes of $20,000.00 each, which were left

46 with the bank, with a statement that they were secured by a deed of (trust.) We did not hold the deed.

Q. Do you remember the names?

Ans. Yes, sir. One of them was C. Weigh & Co., $20,000.00, payable one year after date, to Yaeger & Crangle, endorsed by them; and the other one was a note of C. Harriman & Co., $20,000.00 payable two years from March, 1867—I think the 20th of March—payable to Yaeger & Crangle, and endorsed by them.

Q. After they made this deposit of these notes did you continue to do business with them?

Ans. Then we continued to do business with them.

Q. How long did these two notes remain there?

Ans. They remained until Feby., 1871; Mr. Yaeger came in and had

some conversation with the president, Mr. Edgar, who reported to me. I don't know what Mr. Yaeger said to him.

Q. Did Mr. Yaeger have any conversation with you about the same matter?

Ans. Yes, sir. And I drew up a receipt.

Q. Do you know where that paper is?

Ans. It is on file in the court. Case 248.

Q. What court?

Ans. The United States circuit court.

Q. You have seen it there recently?

Ans. Yes, sir.

Q. What date is the paper?

Ans. Feby. 11th, 1871.

Q. A paper regarding these collaterals?

47 Ans. Yes, sir.

Q. You say you wrote that paper?

Ans. I wrote it, sir.

Q. Did you see Yaeger & Crangle sign it?

Ans. Yes, sir; he signed it in my presence.

Q. And you delivered the paper to them?

Ans. Yes, sir; and he gave me this and stated the papers were to be returned, or their equivalent.

Q. What was said by Yaeger & Crangle at the time when they gave this paper to you, or before to you, about the return of these securities?

(Counsel for respondent objected to the question.)

Ans. I don't know what conversation was had with Mr. Edgar, but when I delivered the paper to Mr. Yaeger, myself, personally, he said to me that when the property was either sold or transferred that we would be put in possession of the proceeds. I think he said either the money or the deeds for the property.

Q. What property did he refer to?

Ans. The property which secured these two notes.

Q. Was anything said to you by Yaeger & Co., or either of them in regard to the purpose for which they wanted the collaterals, and if anything was said, what was said?

Ans. Nothing was said.

Q. Were these collateral notes ever returned to the bank?

Ans. No, sir; they were demanded of them.

Q. But not returned?

Ans. No, sir.

48 Q. Do you know whether any other collaterals were afterwards given by them to the bank?

Ans. Yes, sir. Mr. Yaeger handed me a deed for some mill property, at the town of Okaw, Washington County. I don't remember the specific details of the deed, but I know it referred to a mill with some four or five acres of ground, which was returned as a part of the collateral to me.

Q. Do you remember who the deed was from, and who it was to, who were the parties to the deed?

Ans. I would not be certain, but I think it was drawn by some State official, a master in chancery, or something like that to Yaeger & Co., sold under some order of the court, or sheriff, or something of that kind.

Q. Was it delivered to you in person?

Ans. Yes, sir.

Q. If there was anything said at the time of the delivery between you and Mr. Yaeger, will you state what it was?

Ans. Mr. Yaeger handed me the deed with the statement that it was a deed good to us for that property, and I think he stated, but I would not be very certain, that it was the result of one of the notes he had taken from us, the note of C. Harriman & Co., I think it culminated in the property being sold and the deed made to them. I never asked them how the connection was between them. We always considered the notes as strong collaterals from the statement the bookkeeper made to us.

(Counsel for defendant objected to the witness stating what he considered, and what the bookkeeper said to him.)

49 Q. What became of this master's deed; did you retain it in the bank?

Ans. It was in the bank when I left for Europe last summer.

Q. The summer of 1873?

Ans. Yes, sir. I don't know whether I am stating it right. It had been in my possession till a short time before I went to Europe. It was then in the hands of the attorney for the bank, M. L. Gray.

Q. Do you know for what purpose it was in his hands?

Ans. Yes, sir.

Q. What was it?

Ans. I desired M'r Gray, on the part of the bank, to draw up such a document that that deed would really become the property of the bank without any further cavil. We wanted to have the property used in such a way that it would be transferred to the bank under the deed, if such a thing could be done, and M'r Gray was studying up the case and was writing up the papers.

Q. Do you know where that paper is?

Ans. I saw it recently on file in court, among the papers in the case I mentioned before, in the United States circuit court.

Q. The paper you refer to is the paper there in the nature of a mortgage?

Ans. Yes, sir; because I remember at that time I gave M'r Gray a list of all the indebtedness that M'r Yaeger had with the bank, all

50 their indebtedness to us, which was a long way beyond the amount we had for security.

Q. Do you know what was done with this paper you spoke of, in the nature of a mortgage, which is on file in the United States court, after it was prepared?

Ans. Nothing of my own knowledge.

Q. As near as you can recollect, what was the amount of the indebtedness of Yaeger & Co. to the bank at the time this collateral security and notes were originally given?

(Counsel for the defendant objected to the question on the ground that it was only proper for the witness to state what, if any papers the bank held against the party, and for the court to ascertain the indebtedness.)

Ans. I think they owed somewhere about $75,000.00.

Q. At the time the original collaterals were given?

Ans. When we required them to be given us our bank had allowed them a line of drafts, unaccepted drafts on parties in the country, based on shipments of flour, of which we had no evidence. We were willing to give them a line to a certain extent, and beyond that we asked them security. When they refused to give it we withdrew our line and they owed us nothing until they returned to us the deed. I think it was about that time we had recommenced to discount for them.

Q. After they returned the deed?

51 Ans. Yes, sir; the bank had refused to lend them any more money after they had withdrawn the collateral securities, and they were entirely out of the concern; and, I think it was along in the summer of 1871, I would not be very positive though, that they owed us nothing.

Q. Do you remember about the time the master in chancery deed was deposited with you?

Ans. I think somewhere about the year 1872. I' was quite a number of months we did not see the Yaeger folks in the house. As they took the papers away in February, 1871, it is possible it was the year. I would not be positive of that, that we had nothing to do with them.

Q. About what amount was Yaeger & Co. owing your bank when they failed?

Ans. I was not here at the time. I was in Europe and I have no positive knowledge of my own. I know now that they owe us over $40,000.00 on paper.

Q. Have you any security for this $40,000.00 they owe you?

Ans. Nothing except this deed which we held; this deed and their agreement to return the collaterals.

Q. Is any of it in the shape of acceptances of other parties of the drafts of Yaeger & Co.?

Ans. Yes, sir; some of them have failed and are in bankruptcy—quite a number of them and offer to pay nothing, and others are drafts on parties whom Yaeger & Co. instructed to remit the amounts to them and they admit they did receive the money. We have those sight-

52 drafts not accepted with no kind of security.

Q. They owe you about $40,000, for which you hold no security except what you claim in this suit?

Ans. Yes.

Cross-examination:

Q. Have you charge of the books and papers of that bank as its cashier?

Ans. Yes.

Q. You are the chief officer of the concern that has charge of its business and the management of it?

Ans. I fill the duty of cashier.

Q. Everybody may not know what the duty of a cashier is in a bank, some cashier's duty may be nothing; what is your duty in the Continental Bank, is it to have control of the books of the bank, and the entire business of the bank?

Ans. I attend to the legitimate duties of the cashier as prescribed by the by-laws—no more than cashiers usually do.

Q. Under whose direction is the teller?

Ans. Under mine.

Q. Under whose control is the bookkeeper?

Ans. I have a reasonable control over him.

Q. Are not all the employees under you—you have control of them?

Ans. They are not employed by me. They are employed by the board of directors, and any questions concerning the business of the

53 bank, required to be answered, they come to me. The general direction they get from the board of directors.

Q. Don't the board of directors give all instructions through you?

Ans. No, sir.

Q. Does the board of directors call in the tellers and clerks and give them directions?

Ans. They do on certain occassions; for instance, if they want to examine the bank they call each party in having in charge that special department; the teller reports to them his cash, and they examine it, and so they do as to papers, although I am responsible to the bank for the cash.

Q. How does the discount clerk know what paper has been discounted in a day?

Ans. He gets it through me.

Q. Through any one else?

Ans. No, sir.

Q. All the paper discounted and loans made they get the information through you.

Ans. Yes, sir.

Q. Do your books show all loans made to Yaeger & Co.?

Ans. Yes, sir.

Q. Can you, and will you, furnish the notary a list of all such loans, giving the day and the discount, maker and drawer and endorser of it, and the amount of all ever since you did business with Yaeger & Co.?

Ans. I could not do it unless some one compelled me to.

54 Q. Can you do it?

Ans. Yes, sir; I can give you a description of every transaction the bank has had in eight years.

Q. Only with Yaeger & Co.?

Ans. We can do it if it is required, but I should not like to undergo the work, that would take me six months to do, for the gratification of anybody's curiosity.

Q. Can you furnish a statement showing these facts of what paper you had at the time these collaterals were furnished to the bank?

Ans. Yes, sir; I can establish the date at which the collaterals were handed to the bank, probably through Mr. Maurice, the cashier.

Q. You were not the cashier at the time, but Mr. Maurice was?

Ans. Yes, sir; I was general bookkeeper.

Q. At the time they were withdrawn who was cashier?

Ans. Mr. Maurice, and I was bookkeeper.

Q. As the bookkeeper you had charge of that part of the papers?

Ans. Yes, sir.

Q. Can you furnish from the books you then had?

A. I can bring the books in court.

Q. We can't do it, we have to have it in written evidence. Can you furnish a statement of what paper Yaeger & Co. owed the bank at the time the collaterals were withdrawn?

Ans. I can do that.

55 Q. Can you furnish a similar statement of what paper you held against Yaeger & Co. at the time of the failure?

Ans. Yes, sir; we can do that.

Q. Will you furnish those three statements?

Ans. Yes, sir; the statement of the indebted at these three periods.

Q. Showing the names of the drawers and acceptors?

Ans. To furnish a statement of Yaeger & Co.'s business for eight years would make a great deal; this can't be done in a short time. We had $100,000^{00}$ of paper, which consisted of amounts from $\$20^{00}$ to $\$1,000^{00}$.

Q. I want it at the time of the deposit of the collateral security; at the time they were withdrawn; and at the time of the failure. Is there any way you can fix the date at which the collaterals were left?

Ans. I can fix the year.

Q. What year was it?

Ans. 1867.

Q. Can you fix the month?

Ans. No; but it was the year 1867. If you like it, for any date during that year, I can give you a statement of what they owed us at that time.

Q. I believe you were not a member of the board; you were not present when discounts were made then?

Ans. I am always present when discounts are made.

Q. When were you elected cashier?

Ans. In July, 1871.

Q. Was there any paper outside of sight drafts taken from Yaeger & Co. without being put before the board before discounted?

Ans. No, sir.

56 Q. Did you take any drafts drawn on parties through the country unless there was an endorser on the paper?

Ans. Yes, sir; I took some loans secured by their collateral security; I never lent them a dollar on their own name.

Q. During the time you held these collaterals, did you require them to give you endorsers on warehouse receipts for loans you made them outside of drafts?

Ans. I never made them any except on special collaterals.

Q. Yaeger & Co., during all this time, kept an account with you as depositors?

Ans. Yes, sir, ever since 1867, with the exception of this period which I mentioned.

Q. Can you fix that period, from what day to what day, they failed to keep an account?

Ans. Not unless I examine the books.

Q. How long will it take you to examine the books?

Ans. A few minutes.

Q. I would like for you to do it.

Ans. I will furnish that date as soon as I have time to examine the books.

Q. What was their line of discount for paper drawn on different parties that had not been accepted?

Ans. $50,000^{00}$ had been the amount which was fixed after they brought in the collateral security in 1867.

Q. What had it been previously?

Ans. Very insignificant amounts. I think the bringing of the collateral securities and the opening of the account was about the same date.

57 Q. You say you were not present when those notes were delivered; you did not receive the notes; Mr. Maurice received them?

Ans. I think I was present when they were handed Mr. Maurice.

Q. Do you know anything that took place at that time, or did it take place between Mr. Maurice and Mr. Yaeger?

Ans. It took place between Mr. Maurice and Mr. Yaeger, the original taking of the collateral in the year 1867.

Q. The first thing you had to do with the collateral was when they were delivered up, and you took that receipt?

Ans. Yes, sir.

Q. Had they failed when you went to Europe?

Ans. No, sir.

Q. They had not suspended at that time?

Ans. No, sir.

Q. When did you go to Europe?

Ans. I left New York the 28th of June, 1873; I received news of their failure in August some time when I was in Germany.

Q. You say when they withdrew this collateral you refused to give them any further discount until they were returned?

Ans. I think I drew up a receipt giving them a reasonable time to turn them around for the purpose of getting the money on the stuff sold; I think I inserted the words "within a reasonable time."

58 Q. How long after you gave up the collaterals, was it before you refused to give them any further discounts, and when it was you stated their accounts ceased with the bank?

Ans. Some few months.

Q. Can you state how long it continued without referring to the books?

Ans. No, sir; I will furnish you that statement.

Q. Have you any data by which you can fix the date at which this deed, as you say, was given to you?

Ans. I could not, only that part of the year, somewhere in 1872, I think.

Q. Do you know about the amount they owed you at the time of the failure?

Ans. No, I don't; I can't fix it without going over the statement of other people; I was not here at the time.

EMILE KARST, second deposition.

1. Int. State your name and occupation?

A. Emile Karst, cashier of the Continental Bank.

2. Int. You have testified once before in this case?

A. Yes, sir.

3. Int. I desire to call your attention to the deed mentioned in your former testimony, as being a deed of a master in chancery to Yaeger & Crangle for some property in O'Kaw, Illinois. Do you know about the time that deed was left at your bank?

59 A. It was some months before I went away to Europe. I went away in June. I am not able to state exactly the number of months, but some months it was in our possession at that time.

4. Int. Did anything pass between the bank and Mr. Yaeger in regard to this deposit of the master in chancery deed between the time you say it was left there and June 1873, when you left this country?

A. Yes, sir; when it was left with me originally—I am not able to tell you the date, but some months before I went away, Mr. Yaeger handed it to me as having been requested by me to put us in possession of the notes and securities which I originally had and gave receipt. He brought in that document to me and handed it to me. He told me that deed was a part of the securities which he brought back to replace others taken away. After a while, some days afterward probably, I looked through the deed and found it was a deed in which our name as a bank was not mentioned. After consultation with the president of the bank I asked Mr. Yaeger to have a deed drawn to cover the case, so as to have it available for the purpose he left it, and he promised he would. He was asked about it from time to time, every time I had an opportunity to ask him, when I considered it not importunate. Ultimately he suggested I should have it drawn by our attorney. I would not be positive whether it was his suggestion, or whether I asked him

60 if he would have any objection to our attorney drawing it up. Finally I handed the document to Mr. Gray to have a deed or mortgage or something drawn up that would cover the case so as to

convey the property to us in case of need, and Mr. Gray told me he would get the law on the subject, it being in the State of Illinois, and would make it, and my idea now is that Mr. Yaeger expressed himself willing to sign the document and make the conveyance to us.

5. Int. Do you know whether Mr. Gray drew it up?

A. Yes, sir; but I think I never saw the paper itself. I think that Mr. Gray told me he had been down to see Mr. Yeager before I left for Europe in June and that it was in a condition of being accomplished. It was only during my absence in Europe I heard the house had failed and I supposed the deed was made.

6 Int. Did you see Mr. Yeager about it afterwards, when Mr. Gray drew up the deed?

A. No; because it was immediately—it must have been a short time before I went away. It was then left with Mr. Gray to finish.

Q. Do you know whether at any time Mr. Yeager refused to execute the instrument?

A. I have no knowledge of it myself. I was informed he had refused.

8 Int. I mean up to the time you left, had he refused?

61 A. No; not that I know of. He had not refused to me; if he had refused to other members of the house, or our attorney, I am not able to swear to that. I presume if he had refused we would have brought suit to make him.

9. Int. Between this time when the deed was deposited with you and the time when you left for Europe, what was your idea of the condition, financial condition, of Mr. Yaeger's firm?

(Counsel for complainant objected to the question as leading and incompetent.)

A. My idea was we required collateral security.

Cross-examination:

1. X Int. Were you in the bank in July, 1871?

A. Yes, sir.

2. X Int. Will you please furnish to the notary a statement of all paper that you held against Yaeger & Co. that was not paid on July 28, 1871?

A. I won't unless I have to, because it is an immense labor. I don't know who is to judge about that. If our attorney requires it I will furnish it.

3. X Int We want to know.

A. It is for him to decide.

4. X Int. Have you got charge of the books of that bank, as the cashier?

A. It is no use to ask such a question; you know very well I have

5. X Int. Can you make out a statement from your books,

62 showing what indebtedness there was from Yaeger & Co. to that bank that had not matured in July, 1871?

A. Yes, sir.

6. X Int. Will you do so, and furnish such statement to the notary to be attached to the deposition?

A. Certainly, if our attorney requires it.

7 X Int. And not otherwise—do I understand you to decline unless your attorney requires you to do so?

A. Certainly. I don't want to do so to please you.

Mr. HAUSSLER (def't's att'y). I now ask that the witness furnish the statement before I proceed any further with my examination. I desire to go on with my examination when the statement is furnished. If you will produce the books I will go on without the statement.

Mr. PLAYER (pl'ff's att'y). I state here that neither the bank nor its attorney have the slightest objection to Mr. Hauessler having the information he desires, but I am uncertain how far c'urtesy requires I should go in arresting the operation of the bank and the legitimate work of its officers in furnishing him a thing which it is my understanding will take a great deal of work to make out; that I will inquire into things and see if it is feasible; if so, I will furnish the desired statement, but we insist the examination shall proceed and be closed now.)

WITNESS. I will furnish anything that is necessary for the clear understanding of the case, whether it takes me six months or not; but
63 I don't propose to furnish things that are not necessary.

Q. Can you state what amount Yaeger & Co. owed to the bank July 28, 1871, without referring to such statement or the books?

A. No, sir.

8. X Int. Can you come within $100,000 of it?

A. No, sir.

M. L. GRAY. (deposition on part of plaintiff.)

1. Int. State your occupation.

A. Lawyer.

2. Int. You have been a practicing attorney in this city since eighteen hundred and seventy?

A. Yes, sir.

3. Int. Did you ever have any business transactions with the National Loan Bank, now known as the Continental Bank of Saint Louis?

A. Yes. I did business for them more or less.

4. Int. Were you ever consulted by them in regard to their business affairs with Yaeger and Company, of this city?

A. I was. I can state in what particulars.

(Counsel for respondent objected to the witness testifying, unless Mr. Yaeger or Mr. Crangle was present.)

5. Int. In regard to what was it?

A. It was in reference to preparing the conveyance, a mortgage from Yaeger and Company to the bank, to secure the existing and after
64 accruing indebtedness from Yaeger & Company to the bank.

6. Int. Did you ever prepare such a deed of mortgage?

A. I did.

7. Int. Will you look at the deed of mortgage, filed as an exhibit in this case, from Yaeger & Company to the National Loan Bank, and state whether or not that is the mortgage you prepared?

A. This is the instrument I prepared and handed to the bank.

8. Int. About what time did you prepare that?

A. It must have been in the spring or early summer of eighteen hundred and seventy-three. I think they first spoke to me perhaps a month or so, or even more, before the paper was drawn, asking me to investigate——

(Counsel for respondent objected to the witness stating anything that passed between him and the bank, unless Yeager & Company, or either of them, were present.)

9. Int. From whom did you get the information on which the deed was drawn?

A. I was furnished with the deed executed by the master of chancery in Illinois to Yaeger & Crangle, on certain mill property in Illinois; it is the same property described in the mortgage that was furnished to me as the property I was to draw a mortgage upon. The mortgage

embraces the property in that instrument furnished to me by Mr.
65 Karst, cashier of the bank.

10. Int. What did you do with the deed of the master in chancery and mortgage after you had prepared it?

A. I returned them to the bank, both of them.

11. Int. Did you ever have anything further to do about these two papers or either of them?

A. Yes. I was consulted in reference to the deed of Yaeger & Crangle after this mortgage had been furnished them, as I was informed, to be executed, the bank still holding that deed, and my advice was sought on the question of returning the deed to them, they having sent for it.

(Counsel for the respondent again objected to the witness stating anything that happened between him and the bank unless the other parties were present.)

WITNESS. I gave them advice in relation to the master's deed to Yaeger & Crangle.

12. Int. Did you learn for what purpose Yaeger & Crangle wanted the master's deed?

(Counsel for respondent objected to the question unless Yaeger or Crangle were present.)

A. I did, from the bank—Mr. Edgar, president of the bank.

13. Int. What was the purpose you learned they wanted it for?

(Counsel for respondent renewed his objections.)

66 A. To compare the description in the deed I had prepared with the description in the master's deed.

14. Int. To see whether it was the same property?

A. Yes.

15. Int. What did you advise?

(Counsel for respondent objected to what witness might have advised as being incompetent.)

A. I told them I thought it was proper to send it to them for the purpose of comparing it with the mortgage, to see if the property was properly described, but my advice was to take a receipt from them showing for what purpose they received it, and to be returned unless the mortgage was returned, acknowledged, and executed by them. The other instrument should be returned to them and left as it stood before. That I think was the substance of what I said to Mr. Edgar. I think I drew in pencil on the envelope, the envelope probably of the letter of Yaeger & Crangle asking for it, the form of memorandum they should ask them to sign on getting the deed, stating about in effect what I have stated.

16. Int. About how long was that after you had prepared the deed of mortgage?

A. It was at least several days, but I do not know but it might have been a week or more after I prepared the instrument, and left the papers with them. I did not expect to see Yaeger & Company to get
67 them to execute it, but to furnish the bank the papers.

17. Int. Did you see Yaeger & Company in regard to the matter?

A. I never did.

Cross-examination:

1. X-int. I suppose you drew that paper in June, eighteen hundred and seventy-three? I see that is the date of it.

A. I think it must have been so.

2. X-int. You have no recollection of having antedated the document?

A. I did not do that. This was some little time after they spoke to me about it. As I had leisure, I looked up the law of Illinois on secur-

ing and after accruing indebtedness; I did not wish to draw it without consulting the law in regard to that.

3. X-int. All you had to do about this you got from the bank, and had to do with the bank?

A. Yes, sir. As I have already said, I never saw Yaeger or Crangle in reference to the matter.

4. X-int. The last time you saw the papers they were in the hands of the bank?

A. Yes; I have seen this paper since—seen it this afternoon.

5. X-int. Previous to the suit being brought?

A. Yes.

By Mr. Player:

18. Int. Look at the copy of the master's deed filed in the case, and see if you recognize that as a copy of the master's deed?

68 A. I recognize the master's name as the same name, and the descriptions of the property is the same.

HENRY C. YAEGER (deposition of).

1. Int. State your name and residence.

A. Henry C. Yaeger; St. Louis.

2. Int. Were you a member of the firm of Yaeger & Co.?

A. Yes, sir.

3. Int. Of whom was that firm composed?

A. Myself and John Crangle.

4. Int. Did your firm ever transact business with the National Loan Bank, now known as the Continental Bank?

A. Yes, sir.

5. Int. Please state if you recollect about what time you began to do business.

A. About the time the bank commenced doing business, whatever time that was.

6. Int. Up to what time did that continue?

A. Up to July, 1873.

7. Int. Please state in a general way the nature of your transactions with this bank?

A. They were our general bankers—buying our bills of exchange.

8. Int. Do you recollect whether at any time your firm deposited with the bank as collateral a certain deed of trust on mill property in Illinois, and notes secured thereby?

69 A. Yes, sir; I recollect such a fact.

9. Int. Do you recollect whether or not this deed of trust and notes were withdrawn from the bank?

A. They were withdrawn.

10. Int. Do you remember whether any memorandum in writing was given to the bank at the time they were withdrawn?

Ans. Yes, sir.

11. Int. Will you look at the exhibit filed in this cause dated Feb'y 11, 1871, and state whether that is the memorandum? (Handing memorandum.)

A. Yes, sir; that is the receipt we gave them for these papers.

12. Int. That is the signature of your firm?

A. That is my signature.

13. Int. For what purpose were this deed of trust and notes withdrawn?

A. In order that we could settle them. We had to sue on one of them and bring them into court, and the lawyer needed the papers.

14. Int. Do you remember what was done with the deed of trust and note of C. Harriman & Co., mentioned in this memorandum?

A. We got judgment against them, brought suit and got judgment and had foreclosure and got possession of the property.

15. Int. What kind of property was that?

A. Mill property. In the town of Okaw, Washington Co., Illinois.

70 16. Int. Will you look at the description of the property as set out in the exhibit filed in this cause, headed "Master's deed," and say if you can whether that is the property that is covered by the deed of trust of C. Harriman & Co.?

A. That is correct; that is the description of the property.

17. Int. Do you remember whether you got a conveyance after the foreclosure of the property?

A. Yes, sir.

18. Int. What kind of a conveyance did you get?

A. A master's in chancery deed for the property to us.

19. Int. Will you look again at the paper marked "Master deed" and state whether you recognize it as a copy of the master's deed you got?

A. That I could not say. It is a correct description of the property. I don't know that I ever saw the deed myself. I never took charge of the papers of the concern—our bookkeeper had them. The description of the property is correct.

20. Int. Did you ever get more than one master's deed for the property?

A. I don't see why we should. I have no recollection of it.

21. Int. Do you remember what was done with the master's deed after you received it?

A. I do not. I presume our bookkeeper took charge of it and put it with the papers of the concern. I presume when we failed
71 it was turned over to Mr. Biebinger, our assignee.

22. Int. Do you recollect whether it was deposited in the Continental Bank?

A. I could not say. I don't recollect.

23. Int. Do you recollect whether at any time after you received the deed of the master in chancery you were applied to by the bank to execute a mortgage on the property of C. Harrim & Co.?

A. Yes, sir. There was more or less talk about that, but never anything done in the matter. Mr. Edgar spoke to me several times about it, and I think Mr. Karsh and Mr. Gray. I don't think there was any paper drawn up. I' was kind of neglected on both sides.

24. Int. Do you remember whether you acceded to their request?

A. I had no objection to it. It was simply not done. Why it was not done, I can't say.

Cross-examination:

1. X-int. This bank, I believe, was one of the banks you did your business with?

A. Yes, sir.

2. X-int. They were your bankers, but you had more of them?

A. Yes, sir.

3. X-int. How many?

A. Fourth National, Merchants', Second National, and National Loan—four banks.

4. X-int. Did you procure any loans from this bank on the
72 faith of this property, or was it on the paper you gave them?

A. This property was never left for any specific purpose. It was a sort of general collateral.

5. X-int. Just the same as your collections or anything you would put there?

A. Well, a little stronger. We had these papers and they were no especial good to us, and they thought they would like to have some security and we left them there.

6. X-int. Did they take all the paper you offered?

A. No; they threw out a good deal of paper, certainly.

7. X-int. Each piece of paper went on its own merit?

A. I presume so. They threw out some of it.

8. X-int. When you gave notes you were required to have endorsers, and when they drew on parties they required the parties to suit them?

A. I don't think we had endorsers. I think we had bank-stock collateral. I don't think we had any accommodation paper discounted there; possibly we might have had a piece. It is a good while ago.

9. X-int. When you would make a loan on any specific securities or stocks, you would give a collateral note?

A. Our business with the bank, I can explain it, was principally bills of exchange, time-bills. We made an occasional loan there for which we gave bank stock or other matters as security. As remarked before, I don't think we had a loan there with an endorser; it was business paper.

73 10. X-int. Did you ever make a loan on your own name exclusively?

A. No; had it on warehouse-receipts, bank-stocks, bills of exchange, and business paper. We had city notes given to us for merchandise.

11. X-int. What was your condition in May and June, 1873?

A. We were insolvent, hoping to swing through.

12. X-int. From the time you commenced to do business with that bank, was there any time at which you had nearly quit, that you did not owe them anything scarcely?

A. Oh, undoubtedly, there were times when they would take very little paper for a space of time, and, of course, it would be maturing every day and coming in.

13. X-int. You remember the time?

A. I could not say positively.

14. X-int. Was not there a time in 1872 in which you scarcely owed them anything?

A. I could not refer to any special time. I know it was frequently during the time we did business with them that they stopped taking paper from us for a long time, and, of course, it would all be paid up; that we were entirely out of their debt since we commenced doing business with them, I don't think.

15. X-int. When did the paper of your firm, if you remember, first go to protest, or any of the paper that was drawn on these parties that owed you a large amount?

A. Early part of July, 1873.

74 16. X-int. You say you saw M'r Gray in regard to the deed of trust?

A. I think M'r Gray spoke to me; that he had, by order of M'r Edgar, drawn up such an instrument. I either met him on the street or in the bank somewhere. I know he did speak to me once, or more than once, probably.

17. X-int. Was there any other agreement made in regard to the giving of any security?

A. That agreement speaks for itself.

18. X-int. *That* the paper that was filed here?

A. That is the only one.

19. X-int. From the time you gave that receipt, up to the time of the failure of your firm, was there any other security demanded of you, except such as you gave as each piece of paper was discounted?

A. I don't know that they ever really made any demand; but M'r Edgar frequently spoke of wanting more, and would like to have something. It was talked over, but just left in that kind of manner.

20. X-int. He required satisfactory names, or satisfactory security, to each piece of paper as they took it?

A. They scrutinized the paper very closely as they took it; more closely than the Fourth National or Second National. M'r Edgar scrutinized paper very closely.

21. X-int. It was all two name paper, or paper secured by drafts?

A. Yes, sir.

WILLIAM C. LITTLE (deposition of).

75 1. Int. Please state your residence and occupation.

A. I live in this city. Banking business.

2. Int. What bank are you connected with, and how long have you been connected with it?

A. I am connected with the Continental Bank, formerly the National Loan Bank, since I entered it, a little over four years ago. I think it is the same institution, really.

3. Int. Do you know Henry C. Yaeger and John Crangle, and how long have you known them?

A. I know them both. I have known Mr. Yaeger five or six years, I suppose; Mr. Crangle since the time I was connected with the bank. I don't think I was acquainted with him before that.

4. Int. They have had business dealings with the bank since you commenced there?

A. Yes, sir; up to the time they discontinued business.

5. Int. Did you have any knowledge of their business transactions with the bank?

A. Yes, sir; I had very close connection with them all the time they were handling papers, &c.

6. Int. Do you know anything about a deed for some mill property in Okaw, Illinois, made to Yaeger & Crangle?

A. I know there was such a deed in the possession of the bank at the time Mr. Karsh left for Europe; when I came in possession of his papers I found it.

7. Int. Emile Karsh?

A. Yes, sir.

8. Int. About what time was it he left for Europe?

76 A. The 24th or 25th of June, 1873; the 25th, I think, 1873. I could tell exactly by looking back to the dates.

9. Int. Did you ever see that paper?

A. Yes, sir; I have had it in my hands after Mr. Karsh left.

10. Int. Did you ever have any conversation with Mr. Yaeger or Mr. Crangle in regard to the paper?

A. I think I spoke to them several times in regard to it—in different respects.

11. Int. About what time was it that you had these conversations with them?

A. It was a very short time after Mr. Karsh left, between that and

the 1st of July, I think, along in that time. It was within ten days, I suppose, after Mr. Karsh left. I spoke to them on several occasions about it.

11. Int. What was said between you at these times when you had these talks?

A. I know Mr. Crangle, I think it was, came in to get the deed or mortgage, or whatever it was; I never read the paper, so I am not just positive about the matter; but he came in to get it for some purpose—to have it fixed in a different shape for the bank; I went back and got it out of the cashier's safe. I had charge of those things. I gave it to Mr. Edgar, I think; he was having some conversation with him, and he gave him the paper.

12. Int. Did you ever have any other conversation with them?

A. I had conversation with them in regard———

By Mr. HAUESSLER:

With who?

77 A. M'r Crangle, mostly. I had with both of them at different times. M'r Crangle was the managing man about finances, and he was oftenest in. I talked with him about his account; his account was short. Acceptances would be returned unpaid that we had discounted. I spoke to him about his account and urged him frequently. He said I need not worry about it; we had collaterals. The deed to the property he considered worth about $20,000; that we need not worry about these things; everything would be fixed; that the deed to the property was to be considered as a general collateral for these things, and as an officer of the bank that was my understanding.

(Counsel for complainant objected to witness' understanding.)

12. Int. Did you ever say anything to M'r Yaeger or M'r Crangle about the deed M'r Gray was preparing, or do you know whether M'r Gray was preparing a deed?

A. That is a matter I don't know anything about.

13. Int. Did you ever have any other conversation with M'r Yaeger or M'r Crangle about the matter of this deed?

A. After it was given into their possession I spoke to M'r Crangle.

By M'r HAUESSLER:

Was this before or after the failure?

A. Before the failure, to bring me this deed or paper, the one he was to bring us for the property, that he had been asked to bring in several times, and he put it off from time to time, for some reason or another. I don't remember he gave any satisfactory reason.

14. Int. Do you know whether he refused to bring it in?

A. I don't know that he refused; but he put it off, postponed
78 it from time to time, said there was some reason; he could not bring it in. I don't know what that was.

Cross-examination:

1. X-int. The most of the business that was done by Yaeger & Co. in your bank was obtaining discounts on drafts drawn on different parties through the country?

A. That was the bulk of their business; drawing drafts which they represented to be on shipments.

2. X-int. These drafts, where they would bring them in, were not accepted?

A. As a general thing not.

3. X-int. They would bring in a lot of paper and the bank would dis-

count such portion as they saw fit, when the directors met; the balance would be returned to them?

A. Yes, sir.

4. X-int. There was a great deal refused?

A. If the parties drawn on were not satisfactory.

5. X-int. If the name at the other end of the line was not satisfactory it was thrown out?

A. Yes, sir; sometimes we might not want to accommodate them that day.

6. X-int. How long did the paper generally have to run?

A. I don't think we were in the habit of accepting for longer than sixty days.

7. X-int. You don't remember of one instance of paper being taken for longer than sixty days?

A. I don't remember any drafts.

79 8. X-int. Do you remember any paper discounted in the bank, of Yaeger & Co., that has longer than sixty days to run?

A. I think we did.

9. X-int. Can you name any?

A. I don't remember about that time; I remember at one time we had some notes of Memphis parties that had four months to run.

10. X-int. If you know of any case, state it.

A. I can't state any special case.

11. X-int. Was there any time Yaeger & Co. ceased to do business with your bank?

A. There was a time, shortly after I went into the bank, they had no business with us for some months. It was shortly after the Mercantile Bank was opened. Mr. Maurice went there as president. They came back there.

12. X-int. That was in 1871?

A. Yes, sir.

13. X-int. Summer of 1871?

A. I went in there in September, 1871; the 7th of September, 1871, I went in the bank. They were doing a little business there; they dropped off shortly after that. I think they had no business for us for a little while.

14. X-int. They went over and did business with the Mercantile Bank and came back again?

A. They did not give up the Mercantile Bank when they came back.

15. X-int. They did not do any business with you for a short time after the Mercantile Bank opened?

A. Yes, sir.

16. X-int. You think it was several months?

80 A. A few months; they did not deposit as they did.

17. X-int. You say you did not go there till September, 1871?

A. The 7th of September, 1871; I left the Traders' Bank on the 5th and went there two days after.

18. X-int. Don't you know they also quit in April, 1872, and did not do any business again with the bank until about the 1st of June, 1872?

A. I don't remember about that positively; you mean to say they did not do any business?

19. X-int. Yes.

A. There was a time shortly after the Mercantile Bank opened—there was but one time they stopped doing business altogether, for a while.

(Book shown witness.)

20. X-int. I will ask you if from February 2d, 1872, to March 20th, they did not cease to do business there at that bank?

A. From this bank-book, I should say they did.

21. X-int. That bank-book is in your handwriting?

A. Yes, sir.

22. X-int. All the deposits you entered in that book?

A. Yes, sir.

23. X-int. And all the discounts you entered in that book?

A. No, I did not enter them; the note-clerk entered them.

24. X-int. Was there any business done from April 15th to May 24th with that bank?

A. It seems not.

81 25. X-int. Where was this conversation that you spoke of with Mr. Crangle, in which Mr. Crangle remarked you had that deed as collateral security for anything, and who was present at that time?

A. It was held in the office of the Continental Bank, 210 Third street. I don't remember who was present.

26. X-int. Can you give the exact words that Mr. Crangle used to you at that time?

A. No; I cannot.

27. X-int. You say you have never read the paper or deed you spoke of; do you know from your own knowledge of reading it what it was on, whether it was a mortgage or deed?

A. I don't know whether it was a mortgage, deed of trust, or a regular deed. I read the outside.

28. X-int. Outside endorsement?

A. That it was for this property, Okaw Mill.

29. X-int. Was there anything on the outside that said it was Okaw property or mill property?

A. I think it was.

30. X-int. In pencil or ink?

A. In ink, I guess; I am not positive about it.

31. X-int. When any draft would come back, which had not been accepted, you would charge them right back to Yaeger & Co.'s account, or else require them to give a check for the amount?

A. Generally require a check, unless it would be something they would have over.

82 32. X-int. In case the bank was satisfied the party at the other end of the line was good, they would accept the paper?

A. Not always when parties were satisfactory. Sometimes we did not feel like discounting that much at that time.

33. X-int. If the name at the other end was not good, you would not take it at all?

A. No, sir.

34. X-int. As to what took place in May and June, 1871, you don't know?

A. No; not at that time. I was not in the bank.

35. X-int. Do you know what, if any, paper the bank had at the time, May 24th, when Yaeger & Crangle again resumed a new business with them, in 1872 that was?

A. No; I don't remember.

36. X-int. You don't know what paper had not matured at that time?

A. No, sir.

(Defendant objected to all portions of said depositions which stated the conversations at the time of the giving of the receipt for the notes by Yaeger & Co., as also those of the deposit of the master's deed, and

the conversations between the officers of the bank, and how they regarded the deed, and the court overruled all the objections, and defendant duly excepted; and it was agreed that such objection need not be made to each question, but should apply to all the evidence on these points.)

83 Complainant then offered in evidence the unexecuted mortgage referred to by witnesses, as follows, to wit:

This deed of mortgage, made this day of June, eighteen hundred and seventy-three, between Henry C. Yaeger, jr., and , his wife, and John Crangle and , his wife, of St. Louis, State of Missouri, parties of the first part, and the National Loan Bank of St. Louis, a corporation under the laws of the State of Missouri, party of the second part, witnesseth: That whereas the said Henry C. Yaeger, jr., and said John Crangle, partners under the name and style of Yaeger & Co., keep a bank account with the said party of the second part, as their bankers, and said party of the second part has discounted for, or purchased from the said parties of the first part, various notes, drafts, bills of exchange, and commercial paper, at the request and on account of said party of the first part, and to which said parties of the first part are parties as makers, drawers, acceptors, indorsers, or otherwise, and on which said parties of the first part now are, or may become liable to said bank, a schedule of which, as now held by said bank, is hereto annexed and made part hereof.

And whereas, in future dealings between said parties of the first and second parts, it is contemplated that said party of the second part may, if so requested by said parties of the first part, renew the whole or parts of said paper, or take substitutes therefor, or may purchase or discount for said parties of the first part other notes, drafts, bills of exchange, and commercial paper, from time to time, as both said first and second parties may agree, or may pay the checks or overdrafts of said
84 parties of the first part, for such time and for such amounts as said bank may choose.

And whereas it is the desire and agreement of said parties of the first part to fully secure said bank for all sums now due or owing to it, and for all notes, drafts, bills of exchange, checks, overdrafts, or other commercial paper in said schedule set forth, and for all renewals and substitutes therefor; and also for all future advances that said bank may hereafter make to said parties of the first part, whether by discounting or purchasing other notes, drafts, bills of exchange, or other commercial paper, or by loans, or payment of checks or overdrafts, and any and all sums that, on stating balances of account, may be found due said bank from said parties of the first part—said bank having the right at any time to terminate said future dealings at its own option, and require an adjustment of accounts and a settlement of balances due it.

Now, therefore, this deed witnesseth that the said parties of the first part, in consideration of the premises above recited, and of the sum of one dollar to them in hand paid by said party of the second part, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell, and convey, unto the said party of the second part, its successors and assigns, forever, the following-described real estate situate in the county of Washington, State of Illinois, to wit: in the town of Okaw, three $\frac{429}{1000}$ acres
85 lying on the west side of the southeast quarter of the southwest quarter of section sixteen (16), town one (1) south, range four (4) west, commencing forty-six feet (46) north of a stone on the west

boundary line of said southeast quarter of the southwest quarter, set said stone for the northwest corner of Morgan's addition to the town of Bridgeport, running thence north along the west boundary line 4.62[71] chains, to the southwest corner of Harryman street, in the town of Okaw; thence east, along the south side of Harryman street, 7.41 chains, to a post standing for the northeast corner of said 3.429 acre tract, from which post is a stone set for the northwest corner of block No. ten (10), in the town of Okaw, bears south, 86¾° east, 1.00 chains; thence south, along the west side of Okaw street, 4.62[71] chains, to the corner of Okaw and Cannady streets, in the town of Okaw, forty-six (46) feet north of the northeast corner of block two (2), in Morgan's addition to the town of Bridgeport; thence west, along the north side of Cannady street, 741 chains, to the beginning, together, with all the buildings and improvements thereon, being the same premises conveyed to said parties of the first part by John A. Jones, master in chancery of the circuit court of the United States for the southern district of Illinois, dated 6 December, 1872, and recorded among the records of said Washington County, in Book 46, pp. 186, 187, & 188.

To have and to hold the aforementioned premises, and all the privileges and appurtenances thereto belonging, unto the said party of the sec-
86 ond part, its successors and assigns forever: provided, always, nevertheless, that if the said parties of the first part, their heirs, executors, or administrators, shall well and truly pay, or cause to be paid, unto the said bank, party of the second part, its successors or assigns, all the aforesaid notes, drafts, bills of exchange, and commercial paper in said schedule hereto annexed set forth, and all renewals and substitutes therefor, and shall also well and truly pay, or cause to be paid, all advances, loans, or overdrafts hereafter made or paid by said bank, to said parties of the first part, and shall also pay, or cause to be paid, all other notes, drafts, bills of exchange, checks, and commercial paper that said bank may hereafter discount, purchase, or make advances upon to said parties of the first part, in future dealings and transactions, and also all sums and balances that on settlements and accountings had hereafter may be found due or to become due and payable to said bank for any cause, or in any manner whatsoever, then and from thenceforth these presents shall be void; otherwise they shall remain in full force and effect in law and equity.

In witness whereof said parties of the first part have hereto set their hands and seals the day and year first herein written.

[SEAL.]
[SEAL.]
[SEAL.]
[SEAL.]

87 Complainant offered in evidence the record and proceedings of foreclosure had in the circuit court of the United States for the southern district of Illinois, being as follows, to wit:

*Record and proceedings of foreclosure.*

Pleas in the circuit court of the United States of America for the southern district of Illinois, in chancery sitting, held at the city of Springfield, in said district, before the Hon. Samuel H. Treat, district judge of said district, and in the absence of the Hon. Thomas Drummond, judge of the seventh judicial circuit, pro tempore, sole judge of said circuit court, on Saturday, the second day of March, in the January

term of said court, in the year of our Lord one thousand eight hundred and seventy-two, and of our Independence the ninety-sixth year.

HENRY C. YEAGER AND JOHN CRANGLE, partners under the firm-name of Yeager & Co.,
*v.*
CHARLES HARRYMAN, THOMAS HARRYMAN, Wyatt Cannedy, Wine Cannedy, his wife, Amanda M. Harryman, and Elizabeth Harryman. } In chancery.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

Henry C. Yeager and John Crangle, partners under the firm name of Yeager & Co., complainants, citizens of the State of Missouri, put in their place Mess'rs Stuart, Edwards and Brown, their solicitors, in a bill of complaint to foreclose a trust deed against the before-
88 mentioned defendants, who are citizens and residents of the said southern district of Illinois, and who put in their place James A. Kennedy, esq., and Amos Walls, esq., their solicitors.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that, heretofore, to-wit, on the twenty-eighth day of April, in the year of our Lord one thousand eight hundred and seventy-one, came said complainants, by their said solicitors, and filed in the clerk's office of the circuit court of the United States for the southern district of Illinois their bill of complaint to foreclose a trust deed against said defendants, praying the issue of a writ of subpœna therein, returnable the first Monday of the month of June next; and also, at the same time, filed their bond for costs and trust deed in said cause, which said bond for costs, bill of complaint, and trust deed are in the words and figures following, to wit:

UNITED STATES OF AMERICA,
*Southern District of Illinois, ss:*

Circuit court, June term, A. D. 1871.

HENRY C. YEAGER ET AL.
*vs.*
CHARLES HARRYMAN ET AL. } In chancery.

We do hereby enter ourselves security for costs in this cause, and acknowledge ourselves bound to pay, or cause to be paid, all costs which may accrue in this action, either to the opposite party
89 or to any of the officers of this court, in pursuance of the laws of this State, and of the United States.

Dated this 28th day of April, 1871.

STUART, EDWARDS & BROWN.

(Indorsed:) Filed April 28, A. D. 1871. J. A. Jones, clerk.

To the honorable the judges of the circuit court of the United States, for the southern district of Illinois, in chancery sitting, humbly complaining, your orators, Henry C. Yeager and John Crangle, partners doing

business at St. Louis, Missouri, under the style and firm-name of Yeager & Co., and who are citizens of the State of Missouri, bring this their bill against Charles Harryman, Thomas Harryman, and Wyatt Cannedy, partners doing business at Washington County, Illinois, under the style and firm-name of C. Harryman & Co., and Wine Cannedy, Amanda Harryman, and Elizabeth Harryman, and who are each and all citizens of the State of Illinois, and residents of said southern district; and thereupon your orators complain and say, that on the twenty-third day of March in the year of our Lord one thousand eight hundred and sixty-seven, the said C. Harryman & Co. were indebted to your orators in the sum of twenty thousand dollars, and being so indebted, the said defendants, by the style and in their firm-name of C. Harryman, executed to your orators their certain promissory note bearing date said 23d
90 day of March, 1867, and by which they promised to pay to the order of your orators by the style of Yeager & Co., on or before two years after said date, the sum of twenty thousand dollars for value received, negotiable and payable without defalcation or discount, with interest after maturity at the rate of ten per cent. per annum, said note secured by deed of trust, duly stamped according to law. Your orator further state and charge, that still further to secure the payment of said sum of twenty thousand dollars, due and evidenced by said notes, Charles Harryman, Thomas Harryman, and Amanda M. Harryman, and Elizabeth Harryman, their wives, and Wyatt Cannedy, and Wine Cannedy his wife, executed to your orators their certain trust deed or mortgage by which they conveyed to your orators by the style and description of Yeager & Co., the following described real estate in the county of Washington, State of Illinois, to wit: In the town of Okaw 3.429 acres lying on the west side of the S. E. q'r of the S. W. q'r of section 16, T. 1 S., R. 4 W., commencing 46 feet north of a stone on the west boundary line of said S. E. q'r of S. W. q'r, set said stone for the northwest corner of Morgan's addition to the town of Bridgeport, running thence north along the W. boundary line 4.62.71 chains to the S. W. corner of Harryman street in the town of Okaw, thence E. along the S. side of Harryman street 7.41 chains to a post standing for the N. E. corner of said 3.429 acre tract, from which post is a stone set for the N. W. corner of block No. 10 in the town of Okaw, bears S. 86¾
91 E. 100 chains; thence S. along the W. side of Okaw street 4.62.71 chains to the corner of Okaw and Cannedy streets, in the town of Okaw, 46 feet north of N. E. corner block 2, in Morgan's addition to the town of Bridgeport; thence west along the W. side of Cannedy st. 7.41 chains to the beginning, together with all the improvements and buildings thereon. Which said deed of trust or mortgage was and is subject to the condition and in trust for the following purpose, to wit: Whereas the firm of Harryman & Co., a firm composed of the men herein first mentioned, have made, executed, and delivered to the party of the second part their certain promissory note, dated March twenty-third, eighteen hundred and sixty-seven, payable on or before two years after date to the order of Yaeger & Co., for twenty thousand dollars, for value received, negotiable and payable without defalcation or discount, with interest after maturity at the rate of ten per cent. per annum; and whereas, for the purpose of better securing said indebtedness, said parties of the first part covenant and agree with the said parties of the second part and his assigns that said property is now clear and free from all general and special taxes; that the same have always been and hereafter shall be promptly paid, and in case there should be any taxes now in arrear, or in case there shall any default in the punctual

payment of the same at any time hereafter, said party of the second part, or his assigns, at their option may pay the same or redeem
92 said property, and all amounts so expended shall become a debt due additional to the indebtedness aforesaid and secured in like manner by this deed of trust; and said first party further covenants and agrees to keep the buildings and improvements on said premises insured in some good company for the sum of twenty thousand dollars and the policies assigned to said second party. Now, if said promissory note shall be punctually paid at maturity, and if the covenants aforesaid shall be well and truly kept, and all amounts expended as aforesaid shall be refunded and repaid to said party of the second part or his assigns by said parties of the first part or their legal representatives, then the property hereinbefore conveyed shall be released at the costs of the parties of the first part; but if the said promissory note shall not be paid, or in case the payment of an amount expended as aforesaid should not be made, or in case said covenants or any part thereof shall not be fully kept, then this deed shall remain in full force, and the said party of the second part or the sheriff of Washington County, State of Illinois, may proceed to sell the property hereinbefore described, or any part thereof, at public vendue to the highest bidder at the court-house door of said county for cash, first giving twenty days' notice of the time, terms, and place of said sale, and of the property to be sold, by advertisement in some newspaper printed and published in the city of St Louis, Missouri, and upon such sale shall execute and deliver a deed or deeds in fee-simple of the property sold to the purchaser or
93 purchasers thereof, and also by publishing a like notice in some newspaper published in Washington County, Illinois, if there be one, and by posting upon the premises a printed notice of said sale twenty days before the sale, and receive the proceeds of sale, out of which shall be paid first the costs and expense of executing this trust, including compensation to the trustee for services, next, whatever may be due and unpaid on said note, principal or interest, and whatever amount may be expended by said second party as aforesaid, and the remains, if any, shall be paid to said parties of the first part or to their legal representatives. Which said mortgage or deed of trust was acknowledged by said C. Harryman & Co., and was duly recorded and stamped, and which said deed and note are herewith filed and prayed to be taken as a part of this their bill.

Your orators further state and charge that the said amount of money due and payable to your orators from the said C. Harryman & Co., and no part thereof, neither principal or interest, or any part thereof, has been paid by the said C. Harryman & Co., but that the whole amount of said twenty thousand dollars, both principal and interest, and every part thereof, is still due and unpaid, whereby they have the right to have a foreclosure of said mortgage and a sale of said premises, according to the provisions of said deed and note. In tender consideration of all which your orators pray that your honors will take cognizance
94 of their case, and that process may issue that the said Charles Harryman, Thomas Harryman, Wyatt Cannedy, Wine Cannedy, his wife, and Amanda M. Harryman and Elizabeth Harryman may be made defendants to this bill, and that they may be required to make full answers to all the allegations thereof, and that upon a final hearing your honors will order, adjudge, and decree that the said defendants, or some one of them, pay to your orators, by a day to be named by your honors, said sum of twenty thousand dollars and interest thereon, in pursuance of the provisions of said promissory note and said mortgage

and, upon the failure to do so, that the real estate above described & set forth in said mortgage may be sold, and the proceeds of the sale thereof, or enough for that purpose, may be applied to the payment of said note, both principal and interest, and the costs of this proceedings, and that your honor will grant such other and further relief as equity may require; and as in duty bound, &c.

STUART, EDWARDS & BROWN,
*Solicitors for Complainants.*

(Indorsed:) Filed April 28, 1871. J. A. Jones, clerk.

*Trust deed.*

This deed, made and entered into this twenty-third day of March, eighteen hundred and sixty-seven, by and between Harryman & Co., a firm composed of Charles Harryman and Thomas Harryman and Wyatt
95 Cannedy, of Washington County, State of Illinois, parties of the first part, and Yaeger and Co., of the county of S't Louis and State of Missouri, of the second part, witnesseth: that the said parties of the first part in consideration of the debt and trust hereinafter mentioned and created, and of the sum of one dollar to them paid by the said party of the second part, the receipt of which is hereby acknowledged, do by these presents grant, bargain, and sell, convey, and confirm unto the said party of the second part, the following described real estate, in the county of Washington, State of Illinois, to wit, in the town of Okaw, 3.429 acres lying on the west side of the S. E. q'r of the S. W. q'r of section 16, T. 1, R. 4 W., commencing 46 feet north of a stone on the west boundary-line of said S. E. q'r of the S. W. q'r. Set said stone for the N. W. corner of Morgan's addition to the town of Bridgeport, running thence N. along the W. boundary-line 4.62.71 chains to the S. W. corner of Harryman street, in the town of Okaw, thence E. along the S. side of Harryman street 7.41 chains to a post standing for the N. E. corner of said 3.429 acre tract, from which post is a stone set for the N. W. corner of block No. 10, in the town of Okaw, bears S. 86¾ E., 100 chains, thence S. along the W. side of Okaw street, 4.62.71 chains to the corner of Okaw and Cannedy streets in the town of Okaw, 46 feet N. of the N. E. corner of block 2, in Morgan's addition to the town of Bridgeport, thence W. along the N. side of Cannedy street 7.41
96 chains to the beginning, together with all the buildings and improvements thereon. To have and to hold the same, together with the appurtenances, to the said party of the second part, and to their assigns and successors in this trust forever. In trust, however, for the following purpose: Whereas the firm of Harryman & Co., a firm composed of the men herein first mentioned, have made, executed, and delivered to the party of the second part their certain promissory note, dated March twenty-third, eighteen hundred and sixty-seven, payable on or before two years after date to the order of Yaeger and Co., for twenty thousand dollars, for value received, negotiable and payable without defalcation or discount, with interest after maturity at the rate of ten per cent. per annum. And whereas, for the purpose of better securing said indebtedness, said parties of the first part covenant and agree with the said party of the second part and his assigns, that said property is now free and clear from all general and special taxes; that the same have always been and hereafter shall be promptly paid, and in case there should be any taxes now in arrear, or in case there shall be any default in the punctual payment of the same at any time hereafter, said party of the second part, or his

assigns, at their option, may pay the same or redeem said property, and all amounts so expended shall become a debt due, additional to the indebtedness aforesaid, and secured in like manner by this deed of trust; and said first party further covenants and agrees to keep
97 said premises insured in some good companies for the sum of twenty thousand dollars, and the policies assigned to said second party. Now if the said promissory note shall be punctually paid at maturity, and if the covenants aforesaid shall be well and truly kept, and all amounts expended as aforesaid shall be refunded and repaid to said party of the second part or his assigns by said parties of the first part or their legal representatives, then the property hereinbefore conveyed shall be released at the cost of the parties of the first part. But if the said promissory note shall not be paid, or in case the payment of an amount expended as aforesaid should not be made, or in case said covenant or any part thereof shall not be fully kept, then this deed shall remain in full force, and the said party of the second part, or the sheriff of Washington County, State of Illinois, may proceed to sell the property hereinbefore described, or any part thereof, at public vendue, to the highest bidder, at the court-house door of said county, for cash, first giving twenty days' notice of the time, terms, and place of said sale, and of the property to be sold, by advertisement in some newspaper printed and published in the city of S't Louis, Missouri, and upon such sale shall execute and deliver a deed or deeds in fee simple of the property sold to the purchaser or purchasers thereof, and also by publishing a like notice in some newspaper published in Washington County, Illinois, and by posting upon the premises a printed notice of said sale, twenty days before the sale, and receive the proceeds of sale, out
98 of which shall be paid first the costs and expenses of executing this trust, including compensation to the trustee for services, next whatever may be due and unpaid on said note, principal or interest, and whatever amount may have been expended by said second party as aforesaid, and the remainder, if any, shall be paid to said parties of the first part, or to their legal representatives, and said party of the second part covenants faithfully to perform and fulfil the trust herein created. In testimony whereof the parties have hereunto set their hands and seals the day and year aforesaid.

CHARLES HARRYMAN. [SEAL.]
THOMAS HARRYMAN. [SEAL.]
WYATT CANNEDY. [SEAL.]
her
WINE + CANNEDY. [SEAL.]
mark.
her
AMANDA M. + HARRYMAN. [SEAL.]
mark.
her
ELIZABETH + HARRYMAN. [SEAL.]
mark.

[Internal revenue stamps for $20.00 cancelled.]

STATE OF ILLINOIS,
*Washington County, ss:*

Before me, Daniel Stark, a justice of the peace in and for the county aforesaid, personally appeared Charles Harryman, Thomas Harryman, and Wyatt Cannedy, personally known to me to be the persons whose names are subscribed to the foregoing deed of trust, and acknowledged that they signed, sealed, and executed said instrument of writing

99 for the purposes therein mentioned. I also certify that the interlineations and erasures in the foregoing instrument were made before the same was signed by the above parties. Given under my hand and seal this 25 day of March, A. D. 1867.

[SEAL.] DANIEL STARK, *J. P.*

(Indorsed:) Filed for record May 4th, 1867. Recorded in book 32, pages 232, '33, '34. John N. Vernon, recorder.

(Also indorsed:) Filed April 28th, 1871. J. A. Jones, clerk.

Whereupon a writ of subpœna was issued as prayed for, directed and delivered to the marshal of the southern district of Illinois to execute, returnable on the first Monday of June, A. D. 1871, and was afterwards, to wit, on the ninth day of May, A. D. 1871, returned by said marshal duly executed upon said defendants; which said writ, together with the marshal's return, is in the words and figures following, to wit:

100 *Subpœna.*

UNITED STATES OF AMERICA,
*Southern District of Illinois, ss:*

The United States of America, to Charles Harryman, Thomas Harryman, Wyatt Cannedy, Wine Cannedy his wife, Amanda M. Harryman, and Elizabeth Harryman, greeting:

We command you and every of you that you appear before our judges of our circuit court of the United States of America, for the southern district of Illinois, at Springfield, in said district, on the first Monday in the month of June next, to answer the bill of complaint of Henry C. Yeager and John Crangle, partners doing business under the style and firm name of Yeager & Co., this day filed in the clerk's office of said court, in said city of Springfield, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the southern district of Illinois to execute.

101 Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at Springfield aforesaid, this twenty-eighth day of April, in the year of our Lord one thousand eight hundred and seventy-one, and of our Independence the ninety-fifth.

J. A. JONES, *Clerk.*

MEMORANDUM.—The above-named defendants are notified that unless they shall enter their appearance in the clerk's office of said court, at Springfield aforesaid, on or before the day to which the above writ is returnable, the complainants' bill will be taken against them as confessed, and a decree entered accordingly.

J. A. JONES, *Clerk.*

I hereby appoint Adolph Muehleisen my special deputy to execute this writ. April 28th, 1871.

JOHN L. ROUTT,
*U. S. Marshal.*

*Marshal's return.*

Executed this writ on the 5th day of May, 1871, by reading and delivering a true copy of the same to each of the within named, Charles

Harryman, Thomas Harryman, Wyatt Cannedy, Wine Cannedy his wife, Amanda M. Harryman, and Elizabeth Harryman.

102 JOHN L. ROUTT,
*U. S. Marshal,*
By ADOLPH MUEHLEISEN,
*Special Deputy.*

(Indorsed:) Filed May 9th, A. D. 1871. J. A. Jones, clerk.

Afterwards, to wit, on the fifth day of June, in the June term of said court, of the year aforesaid, the following proceedings were had in said court, in said cause, and entered of record, to wit:

*Entry of appearance.*

HENRY C. YEAGER ET AL. *vs.* CHARLES HARRYMAN ET AL. } In chancery.

This day come the defendants, by James A. Kennedy, esq., their solicitor, and enter their appearance herein.

And afterwards, to wit, on the third day of July, of the year aforsaid, came said defendants, by their said solicitors, and filed their answer herein, which said answer is in the words and figures following, to wit:

103 *Answer.*

UNITED STATES OF AMERICA,
*Southern District of Illinois:*

United States circuit court, southern district of Illinois, June term, A. D. 1871.

HARRYMAN & Co. *vs.* YEAGER & Co. } Bill in chancery to foreclose mortgage.

The joint and several answers of Wiatt Cannedy, Charles Harryman, Thomas Harryman, Wine Cannady, Amanda M. Harryman, and Elizabeth Harryman, defendants in the bill in chancery to foreclose mortgage in suit brought by Yeager & Co., said defendants, by their solicitors, James A. Kennedy and Amos Watts.

These defendants, now and at all times saving to themselves all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in said bill, for answer thereto say: They admit that they executed the note and deed of trust to secure the sum of $20,000.00, but they deny that they owe, or ever since the date of said note, owed Yeager and Co. $20,000.00, and they specifically deny that in equity and justice
104 they owe complainants any sum whatever at this time.

They charge and aver that on the 23d day of March, A. D. 1867, they, defendants, were owners of a merchant mill in Washington County, Illinois, requiring a large amount of capital for use in their business of manufacturing flour for sale at wholesale; that they, said defendants, then and there had their said mill, situate on the ground described in

deed of trust mentioned in bill on file in this cause, insured for the sum of $3,000.00, the policy expiring some time in the month of November or December, A. D. 1867, the defendants not being able to state the precise time when it expired, said policy having been delivered to complainants as hereinafter stated; that complainants were then in the business of commission merchants in S't Louis, Missouri.

Defendants charge and aver that on or about the day of the date of the note mentioned in bill in this cause complainants agreed to furnish defendants, Charles Harryman, Wiatt Cannada, and Thomas Harryman, who were then partners, doing business in the firm-name of C. Harryman & Co., the sum of $2,000.00, with which to purchase wheat to be manufactured into flour at the mill of said defendants, to be sent to complainants, for sale by them on commission, and executed the note and deed of
105 trust to secure the same at the time mentioned in complainants' bill.

Defendants further charge and aver that they executed said deed of trust, had the same recorded, and delivered it to complainants afterwards, and it was then and there agreed between complainant and said C. Harryman & Co. that defendants should draw on complainants for such sums as they might need from time to time, not to exceed at any one time during two years from date of note & deed of trust the sum of $20,000.00, and defendants should not be charged interest on any part of said $20,000.00 not used by them during said two years.

Defendants further charge and aver that afterward, to wit, on or about the 23rd day of March, A. D. 1867, as a further security to complainants for their advances, they, said defendants, assigned to complainants $22,500.00 of their insurance on their mill, which insurance extended to the months of November or December, A. D. 1867, as hereinbefore stated, and delivered the policy assigned to complainants as a further security to them for advances made by them on the note.

Defendants aver and charge that they fulfilled their part of the agreement, and manufactured and sent to complainants large quantities of flour between the said 23rd day of March, A. D. 1867, and the
106 31st day of October, A. D. 1867, amount in all to the aggregate value of near $45,000.00, the precise amount not being known to the defendants, some of the monthly statements of complainants being missing from among the papers of defendants, if they ever came to hand, and complainants paid to defendants, at various times between said dates, about $45,000.00, defendants being unable to state precisely for the reason above named. Defendants further show, charge, and aver that on the 31st day of October, A. D. 1867, according to accounts rendered by complainants at that time, there was only $5,219.80 due complainants, counting all charges and credits as correct, made by complainants up to that time, counting $619.43 interest compounded monthly on defendants, as shown by bills rendered by complainants, which defendants claim is illegal and should not be allowed.

Defendants charge and aver that in the month of October, A. D. 1867, complainants, while having in their hands the sum of over fourteen thousand of the $20,000.00 agreed to be advanced by them, while they held defendants', C. Harryman & Co., note secured by deed of trust mentioned in bill, and further secured by the assignment to them of $22,500.00 of the policy of insurance on said mill, which sum of $14,000.00 and over defendants were then entitled to demand and have of them,
107 they, said complainants, refused to make further advances and protested the drafts drawn by said defendants, C. Harryman & Co., on them; that said last-named defendants repeatedly called on said

complainants afterwards, and requested them to furnish money as they agreed to do when defendants executed and delivered to them the note, deed of trust, and insurance policy, as before stated, but complainants failed and refused so to do, by reason of which refusal, protest, failure to advance money as they were bound to do, and holding the note and deed of trust now sought to be foreclosed as a mortgage, said defendants, C. Harryman & Co., were, and have been, unable to procure from any other source the capital and means necessary to carry on their milling business as aforesaid, and in and during the two years from March 23rd, A. D. 1867, to March 23rd, 1869, were compelled to discontinue their business of manufacturing flour for sale, and were greatly injured in their credit, and lost the use of their mill for over seventeen months of said two years, the time they were to have the use of said $20,000.00 from complainants. And defendants aver that they were injured and sustained damages by the wrongful acts of said complainants, as above stated, arising out of the particular transaction upon which com-
108 plainants, claim originated, sued on in this cause, to the amount of six thousand dollars, which they will set off and offer to recoup against any demand which complainants may have or may prove in this cause.

And defendants further charge and aver that, to the best of their knowledge and belief from a careful examination of their books, receipts, and statements furnished by , complainants received of them, and has never accounted to them for the same or paid them, a large quantity of flour, to wit, fourteen hundred barrels of flour, of the value of ten thousand dollars, for which complainants, as said defendants aver, to the best of their knowledge and belief, are indebted to defendants *for* at this time.

Defendants further show that complainants, after having violated their agreement, protested their (defendants') drafts, injured defendants as above stated, they, said complainants, continued to have the mill insured, and charged the premium to these defendants, amounting in all, from December, A. D. 1867, to November 1st, A. D. 1869, to the sum of $2,198.00 in all, which is unjust, as defendants charge, aver, are advised and believe, and is part of the claim which complainants are attempting to enforce in this suit, and they protest against its allowance; and having answered all the material allegations in complainants' bill, they
109 pray judgment against complainants for any balance due them, and for costs expended by them in this behalf.

WIATT CANNADA,
CHARLES HARRYMAN,
THOMAS HARRYMAN,
WINE CANNADA,
AMANDA M. HARRYMAN,
ELIZABETH HARRYMAN,
*Defendants.*

JAMES A. KENNEDY,
AMOS WATT,
*Att'y & Sol'rs for Defendants.*

STATE OF ILLINOIS,
*Washington County:*

On this 21st day of June, A. D. 1871, before James M. Rountree, master in chancery for Washington County, Illinois, personally appeared Wiatt Cannada, Charles Harryman, and Thomas Harryman, to me personally known as the defendants in the case of Yeager & Company vs. Charles Harryman, Wiatt Cannada, Thomas Harryman, and others

named in the foregoing answer, who, being duly sworn, on oath say that the foregoing answer has been read to them, and the statements therein are true in substance and in fact, to the best of their knowledge and belief.

CHARLES HARRYMAN.
WIATT CANNADY.
THOMAS HARRYMAN.

110 Subscribed and sworn to before me this 21st day of June, A. D. 1871.

JAMES M. ROUNTREE,
*Master in Chancery, Washington County, Illinois.*

STATE OF ILLINOIS,
*Washington County, ss:*

I, S. M. Elwood, clerk of the circuit court in and for Washington County, State of Illinois, do hereby certify that James M. Rountree, whose genuine signature appears to the above affidavit, is the acting master in chancery for said county of Washington, regularly appointed by order of the circuit court of said county, and duly qualified, according to law, to act as such.

Witness my hand and official seal of my office, in Nashville, Washington County, Illinois, on this 21st day of June, A. D. 1871.

[L. S.] S. M. ELWOOD, *Clerk.*

(Indorsed:) Filed July 3, 1871. J. A. Jones, clerk.

Then afterwards, to wit, on the sixth day of said July, of the year aforesaid, came again said complainants, by their solicitors, and filed in said clerk's office their replication to defendants' answer herein, which said replication is in the words and figures following, to wit:

*Replication.*

In the United States circuit court for the southern district of Illinois.
June term, A. D. 1871.

111 The replication of Yeager & Co., complainant, to the joint and several answer of Harryman & Co. These repliants, saving and reserving to themselves all and all manner of advantage of exception which may be had or taken to the manifold errors, uncertainties, and insufficienc'es of the answer of the said defendant, for replication thereunto saith that they do and will aver, maintain, and prove their said bill to be true, certain, and sufficient in the law to be answered unto by the said defendants, and that the answer of said defendants is very uncertain, evasive, and insufficient in the law to be replied unto by these repliants, without this, that *that* any other matter or thing in the said answer contained material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed or denied, is true; all which matters and things these repliants are ready to aver, maintain, and prove, as this honorable court shall direct; and humbly pray as in and by their said bill they have already prayed.

STUART, EDWARDS & BROWN,
*For Complainants.*

(Indorsed:) Filed July 6th, 1871. J. A. Jones, cl'k.

Afterwards, to wit, on the seventh day of August, of the year
112 aforesaid, the following further proceedings were had in said court in said cause, and entered of record, to wit:

*Leave to file exceptions.*

HENRY C. YEAGER ET AL.
*vs.*
CHARLES HARRYMAN ET AL. } In chancery.

This day come the parties, by their solicitors, and by agreement leave is granted complainants to file exceptions to defendants' answer herein:

Exceptions.

UNITED STATES OF AMERICA,
*Southern District of Illinois:*

HENRY C. YEAGER ET ALS.
*vs.*
CHARLES HARRYMAN ET ALS. } In chancery.

Now come the complainants and except to so much of the answer of the defendants, filed herein on the 3rd day of July, 1871, as sets up a failure and refusal on the part of the complainants to make further advances, and claims damages therefor, as follows:

"Defendants charge and aver that in the month of October, A. D. 1867, complainants, while having in their hands the sum of over fourteen thousand of the $20,000.00 agreed to be advanced by them while they held defendants, C. Harryman & Co's, note secured by deed of trust mentioned in bill, and further secured by the assignment to them of $22,500.00 of the policy of insurance on said mill, which sum of
113 $14,000.00 and over defendants were then entitled to demand and have of them, they said complainants refused to make further advances and protested the drafts drawn by said defendants, C. Harryman & Co., on them; that said last-named defendants repeatedly called on said complainants afterward, and requested them to furnish money as they agreed to do when defendants executed and delivered to them the note, deed of trust, and insurance policy, as before stated, but complainants failed and refused so to do, by reason of which refusal, protest, failure to advance money as they were bound to do, and holding the note and deed of trust now sh*o*ught to be foreclosed as a mortgage, said defendants, C. Harryman & Co., were and have been unable to procure from any other source the capital and means necessary to carry on their milling business as aforesaid, and in and during the two years from March 23rd, A. D. 1867, to March 23rd, 1869, were compelled to discontinue their business of manufacturing flour for sale, and were greatly injured in their credit and lost the use of their mill for over seventeen months of said two years, the time they were to have the use of said $20,000.00 from complainants; and defendants aver that they were injured and sustained damages by the wrongful acts of said complainants, as above stated, arising out of the particular transaction
114 upon which complainants' claim originated, sued on in this cause, to the amount of six thousand dollars, which they will set off and offer to recoup against any demand which complainants may have or

may prove in this cause; and defendants further charge and aver that to the best of their knowledge and belief, from a careful examination of their books, receipts, and statements furnished by complainants, that complainants received of them, and has never accounted to them for the same or paid them, a large quantity of flour, to wit, fourteen hundred barrels of flour, of the value of ten thousand dollars, for which complainants, as said defendants aver, to the best of their knowledge and belief, are indebted to defendants for at this time; defendants further show that complainants, after having violated their agreement, protested their (defendants') drafts, injured defendants as above stated, they said complainants continued to have the mill insured and charged the premium to these defendants, amounting in all, from December, A. D. 1867, to November 1st, A. D. 1869, to the sum of $2,198.00 in all, which is unjust, as defendants charge, aver, are advised, and believe, and is part of the claim which complainants are attempting to enforce in this suit, and they protest against its allowance"; because the same present no ground of defense or set-off to this action.

STUART, EDWARDS AND BROWN, *A. P. D.*

(Indorsed:) Filed August 7th, 1871. J. A. Jones, cl'k.

115 Now afterwards, to wit, on the twenty-seventh day of November, of the year aforesaid, came again the parties, by their solicitors, and filed in said clerk's office their stipulation, in the words and figures following, to wit:

*Stipulation.*

In the circuit court United States southern dist. Illinois.

YEAGER & Co. *vs.* HARRYMAN & Co. } In chancery.

It is agreed in this case that the exceptions to the answer in the said cause now on file shall be withdrawn; and the issues are made up upon the bill, answer, and replication shall stand, and with leave to the complainants to make the same objection on the trial of said cause to any defect of substance only which is presented by said answer that they, said complainants, could make to said answer by exception thereto for want of substance therein.

J. A. KENNEDY,
By ROBINSON, KNAPP AND STUART,
*Sol'rs for Def'd'ts.*
STUART, EDWARDS & BROWN,
*For Complainant.*

Springfield, Ills., Nov. 27th, 1871.

(Indorsed:) Filed Nov'r 29th, 1871. John A. Jones, *Clerk.*

Afterwards, to wit, on the fifteenth day of January, in the January term of said court, in the year of our Lord one thousand eight
116 hundred and seventy-two, the following further proceedings were had in said court in said cause and entered of record, to wit:

*Order of court.*

HENRY C. YEAGER ET AL.
*vs.*
CHARLES HARRYMAN ET AL. } In chancery.

This day come the parties, by their solicitors, and on motion of complainants, this cause is referred to the master in chancery of this court to take proofs on part of said complainants, and this cause set for hearing on Monday, the 18th day of March next.

Then afterwards, to wit, on the second day of March, in the January term of said court, of the year last aforesaid, the following further proceedings were had in said court in said cause, and entered of record, to wit:

*Decree.*

HENRY C. YEAGER AND JOHN CRANGLE, partners, under the name of Yeager & Co.
*vs.*
CHARLES HARRYMAN, THOMAS HARRYMAN, Wyatt Cannedy, Wine Cannedy, his wife, Amanda M. Harryman, and Elizabeth Harryman. } In chancery.

This cause came on to be heard at this term, and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz: That unless the said C. Harryman & Co. or said defendants, or some one of the them, pay to the master in chan-
117 cery of this court, for the use of the said Yeager & Co., the sum of eight thousand six hundred and thirty-nine dollars and twenty-four cents ($8,639.24), on or before the first day of October, 1872, with interest thereon from the second day of March, 1872, together with the cost sof this suit, that the said master in chancery proceed and sell without redemption the said real estate conveyed by and described in said deed of trust, to wit, lying and being situate in the county of Washington, and State of Illinois, to wit: In the town of Okaw, 3.429 acres, lying on the west side of the S. E. q'r of the S. W. q'r of section sixteen (16), town one (1), south, range four (4) west, commencing forty-six (46) feet north of a stone on the west boundary line of said southeast quarter of the southwest quarter, set said stone for the northwest corner of Morgan's addition to the town of Bridgeport; running thence north along the west boundary line 4.62.71 chains to the southwest corner of Harryman street, in the town of Okaw; thence east along the south side of Harryman street 7.41 chains to a post standing for the northeast corner of said 3.429 acre tract, from which post is a stone set for the northwest corner of block No. ten (10), in the town of Okaw, bears south 86¾ east 1.00 chains; thence south along the west side of Okaw street 4.62.71 chains to the corner of Okaw and Cannady streets in the town of Okaw, forty-six (46), feet north of the north-
118 east corner of block two (2) in Morgan addition to the town of Bridgeport; thence west along the north side of Cannedy street, 7.41 chains to the beginning, together with all the buildings and improvements thereon. That said master sell said real estate at public vendue, at the door of the court-house of said court, *at public vendue*, for cash, and without redemption, to the highest and best bidder, and between the hours of 9 o'clock in the forenoon and sunset in the after-

noon of the same day. That he cause previous notice of the time and place of such sale to be given by publication for twenty days in some one of the newspapers published in the city of Springfield, Illinois, and by causing a similar notice to be put up in four of the most public places in the county of Washington, Illinois, and by transmitting a copy of said newspaper publications by mail to each of said defendants; that said notices describe said real estate with reasonable certainty; that he execute a deed conveying said real estate to the purchaser or purchasers of said real estate, not subject to redemption: that he first pay out of said purchase money the costs of this proceeding; that, second, he pay to said Yeager & Co. said sum of eighteen thousand six hundred and thirty-nine dollars and twenty-four cents ($18,639.24), with the
119 interest aforesaid, and the remainder, if any, he pay over to the said C. Harryman & Co.; and that he report his proceedings herein to this court. And it is further ordered, adjudged, and decreed by the court that, upon the execution and delivery of the conveyance aforesaid, the said purchaser or purchasers, his or their representatives or assigns, be let into possession of said premises sold, and that any of the parties in this cause who may be in possession of said premises, or any part thereof, and any person who, since the commencement of this suit, has come into the possession under them, or either of them, on the production of the said master's deed of conveyance of said premises, and a certified copy of the order of this court confirming the report of said sale, surrender possession thereof to such purchaser or purchasers, their representatives or assigns. It is further ordered and decreed that said complainants may at their option insure in some reliable company the said mill and improvements upon said real estate to the extent of ten thousand dollars, and charge and collect the premiums paid for such insurance the same and as the other costs of this proceeding.

UNITED STATES OF AMERICA,
*Southern District of Illinois, ss:*

I, J. A. Jones, clerk of the circuit court of the United States in and for the said southern district of Illinois, do hereby certify the
120 foregoing thirty-nine pages contain a true and complete copy of all the papers filed, and proceedings therein had, in a certain cause wherein Henry C. Yeager and John Crangle, partners, &c., are complainants, and Charles Harryman, Thomas Harryman, Wyatt Cannedy, Wine Cannedy, his wife, Amanda M. Harryman, and Elizabeth Harryman are defendants, *are* truly and completely as the same appear of file and record in my said office.

In witness whereof I have hereunto set my hand and seal of said court, at Springfield, in said district, this twenty-third day of December, in the year of our Lord one thousand eight hundred and seventy-three, and of our Independence the ninety-eighth year.

[SEAL.] J. A. JONES, *Clk.*

UNITED STATES OF AMERICA,
*Southern District of Illinois:*

I, Samuel H. Treat, judge of the district court of the United States in and for the southern district of Illinois, do hereby certify that John A. Jones, whose name is subscribed to the foregoing certificate, is and was, at the day of the date thereof, clerk of the circuit court of the United States in and for the southern district of Illinois, duly appointed and qualified, that his signature thereunto is genuine, and that said

certificate and attestation all in conformity with the laws of the United States. Witness my hand this 23rd day of December, 1873.

S. H. TREAT.

121 Complainant also offered in evidence a copy of the deed from the master in chancery to Yeager and Crangle, dated December 6, 1872, and recorded in the recorder's office of Washington County, Illinois, December 19th, 1872. Said deed is in the words and figures following, to wit:

*Deed from master in chancery.*

Know all men by these presents that, whereas, on the second day of March, in the year of our Lord one thousand eight hundred and seventy-two, at the January term of the circuit court of the United States of America for the southern district of Illinois, begun and held at Springfield, in said district, on the first Monday of January, in the said year of our Lord one thousand eight hundred and seventy-two, Henry C. Yeager and John Crangle, partners, under the name of Yeager & Co., obtained a decree against Charles Harryman, Thomas Harryman, Wyatt Cannady, Wine Cannady his wife, Amanda M. Harryman, and Elizabeth Harryman, which said decree is in the words and figures as follows, to wit:

122 HENRY C. YEAGER & JOHN CRANGLE, partners, under the name of Yeager & Co.,
*vs.*
CHARLES HARRYMAN, THOMAS HARRYMAN, Wyatt Cannady, Wine Cannady his wife, Amanda Harryman, & Elizabeth Harryman. } In chancery.

This cause came on to be heard at this term and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz: That unless the said H. Harryman & Co., or said defendants, or some one for them, pay to the master in chancery of this court, for the use of the said Yeager & Co., the sum of eight thousand six hundred and thirty-nine dollars and twenty-four cents ($8,639.24), on or before the first day of October, A. D. 1872, with interest thereon from the second day of March, A. D. 1872, together with the costs of this suit, that the said master in chancery proceed and sell
123 without redemption the said real estate conveyed by and described in the said deed of trust, to wit, lying, being, and situate in the county of Washington and State of Illinois, to wit, in the town of Okaw, 3.429 acres, lying on the west side of the SE. qr. of the SW. qr. of section sixteen (16) town one (1) south, range four (4) west, commencing forty-six (46) feet north of a stone on the west boundary-line of said southeast quarter of the southwest quarter, set said stone for the northwest corner of Morgan's addition to the town of Bridgeport; running thence north along the west boundary-line 4.62 chains to the southwest corner of Harryman street, in the town of Okaw; thence east along the south side of Harryman street 7.41 chains to a post standing for the northeast corner of said 3.429 acres tract, from which post is a stone set for the northwest corner of block No. ten (10), in the town of Okaw, bears south 86¾ east 1.00 chains; thence south along the west side of Okaw street 4.62.71 chains to the corner of Okaw and Cannady streets, in the town of Okaw, forty-six (46) feet north of the northeast corner of block

STATE OF ILLINOIS,
*Washington County, ss:*

I, Solomon M. Elwood, clerk of the circuit court, and ex-officio recorder in and for the county of Washington, in the State aforesaid, do hereby certify the above and foregoing to be a true and correct copy of deed made and executed by John A. Jones, master in chancery, to Henry C. Yeager & John Craugle, dated December 6th, 1872, as the same appears of record in my office, in book 46 of deed records, pages 186, 187, and 188. In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Nashville, this 20th day of December, A. D. 1873.

[SEAL.] S. M. ELWOOD, *Clerk.*

129 The complainant also read in evidence the following stipulation, viz:

*Stipulation as to sale, &c.*

CONTINENTAL BANK, PLAINTIFF,
*vs.*
F. W. BIEBINGER, ASSIGNEE OF YEAGER & CO., defendant.

Whereas the above-named plaintiff has brought suit against defendant to establish an equitable mortgage on the property at Okaw, in Washington County, Illinois, known as the Eagle Mills, which said property is fully described in plaintiff's bill filed herein, and is held by defendants as assignee as aforesaid; and whereas said property is now offered for sale at public auction on the 24th of March, 1874, by the defendant; and whereas it is the belief of both parties that it will be for their best interests that said property should be sold on the day aforesaid, in order to prevent its deterioration in value; and whereas the plaintiff is willing that said sale should be made, provided its rights in this suit are not affected thereby:

Now, therefore, the parties plaintiff and defendant agree that
130 said property may be sold by defendant on the day aforesaid, and the proceeds thereof deposited in the registry of this court, to await the determination of this suit, which it is agreed shall proceed as though such sale had not been made, and as though said property was still held by defendant as such assignee; and if, and when said suit is finally decided in favor of plaintiff, said fund, or so much as is necessary to satisfy the amount decreed to be due it, shall be paid over to it, and it shall acknowledge satisfaction of such decree, except as to costs.

In the event that the plaintiff should become the purchaser of said property at said sale, it is not to be required to pay defendant the amount of the purchase-money until there is a final decision in said suit against it, and it shall then be required to pay the amount so bid by it, with 8 % interest thereon from the day of sale.

SLAYBACK & HARENSLER,
*For Assignee, Continental Bank.*
By T. B. EDGAR, *Pres'd't.*

131 The complainant then rested.

Respondent then offered in evidence the deposition of John Crang'e, which deposition is in words and figures following, to wit:

*Deposition of J. Crangle.*

CONTINENTAL BANK
*vs.*
BIEBINGER, ASSIGNEE, &C.

John Crangle, being duly sworn on behalf of defendant, on oath says: My name is John Crangle; my age is 36; I reside in this city, and was a member of the firm of Yaeger & Co., of this city. I know the plaintiff in this case. My brother attended to the business of Yaeger & Co. with plaintiff; we all did to some extent, however.

I was not present when the notes of Weihe & Harryman were withdrawn from the plaintiff; but I know of the fact of their being withdrawn.

I don't remember whether I was present when the notes were originally deposited with the National Loan Bank; best recollection is, I was not.

Between February, 1871, and the time Yaeger & Co. ceased to
132 do business, there were one or two slight interruptions in the business of Yaeger & Co. with the bank. From April 15 to May 24th, 1872, and from February 2 to March 20th, 1872, there was no discount obtained by Yaeger & Co. from plaintiff, and during that time there was but one deposit.

I saw a deed of trust or mortgage drawn up to the bank for our firm to execute sometime in 1873; it was on the Okaw property. I don't remember that I saw any of the officers of the bank in regard to executing this paper. If I did have any consolation, it was that I would not sign it.

I don't remember that the officers of the bank ever refused to give us any discount unless those papers were returned.

The plaintiff does not hold any paper now that was discounted by it for our firm in 1872; nor do we owe them anything now that we owed them in 1872.

133 I did not learn, until after our failure, that Mr. Yaeger had executed a receipt for those papers withdrawn from the bank.

Cross-examined by plaintiff:

Occasionally, between 1871 and our failure, Mr. Yaeger went to the bank to transact the business of our firm, when he and I was seldom, if ever, with him. I don't know what happened when he went alone.

I recollect some but not all of the debts of our firm held by the bank; they are all in the shape of returned drafts. To the best of my knowledge none of these drafts are in renewal of debts that arose in 1872.

JOHN CRANGLE.

Signature and certificate waived.
[NOTARY'S SEAL.]

PRESTON PLAYER,
*Notary Public, St Louis Co., Mo.*

It was admitted on the trial that the complainants had never proven their demand against the bankrupt estate; that the property described was out of this circuit, and was of the value of seven thousand three hundred and sixty-nine dollars and ninety cents ($7,369⁹⁰), and brought that much at the sale under the stipulation; that the liabilities of
134 bankrupts were over three hundred thousand dollars ($300,000). and their estate would not pay over twelve per cent. on the dollar,

On the thirtieth day of October, A. D. 1875, the court rendered the following decree, to-wit:

*Decree.*

CONTINENTAL BANK
*vs.*
F. W. BIEBINGER, ASSIGNEE, &C.

This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed as follows, to-wit: That the plaintiff is entitled to the sum of seven thousand three hundred and sixty-nine dollars and ninety cents ($7,369^{90}$), in the hands of the said defendant, F. W. Biebinger, as assignee in bankruptcy of Henry C. Yeager & Company, being the proceeds of the sale of the mill property in Okaw, in the State of Illinois, and particularly described in the bill of complaint herein.

It is further ordered, adjudged, and decreed that the said de-
135 fendant, F. W. Biebinger, assignee as aforesaid, pay to the said plaintiff, the Continental Bank, the said sum of seven thousand three hundred and sixty-nine dollars and ninety cents ($7,369^{90}$), together with the costs herein expended, and have thereof execution.

To which decree the defendant duly excepted at the time.

And afterwards, to wit, on the thirtieth day of October, A. D. 1875, the respondent filed his motion for a rehearing, in words and figures following, to wit:

*Motion for rehearing.*

CONTINENTAL BANK, COMPLAINANT,
*vs.*
F. W. BIEBINGER ET AL., RESPONDENT.

And now comes the responent and files this his motion for a new trial and rehearing herein, and for reasons therefor says:

1st. The finding and decree is against the law.

2d. The finding and decree is against the evidence.

136 3rd. The court was misled by the endorsements on some of the exhibits as to dates.

4th. The court admitted improper, irrelevant, and illegal testimony offered by complainant against the objection of respondent.

5th. Under the evidence the finding should have been in favor of respondent and the bill of complaint dismissed.

6th. The decree is for the wrong party and not warranted by the evidence.

7th. Because after the giving of the receipt by Yaeger & Company, and the surrender to them by complainant of the notes, complainants could have no lien on same or on the land in question.

8th. After the bankrupts were requested to return the securities and failed to do so, and then entirely quit doing business with complainants and paid up to them all they owed, the contract, if any had existed,
137 was at an end; and if the account was again opened on the faith of the deposit of the deed merely, it was in no manner binding on bankrupts, or their assignor, nor did it give complainants any lien on the land, as against the creditors of bankrupts, or defendant as their

representative, nor did the deposit of the deed renew the former agreement.

HAYBACK & HAEUSSLER,
*For Respondents.*

This the court overruled and defendant duly excepted.

And on said thirtieth day of October, A. D. 1875, the following appears of record in said cause, to wit:

*Motion for rehearing overruled.*

CONTINENTAL BANK
*vs.*
F. W. BIEBINGER, ASSIGNEE, &C.

Now comes the defendant, by his solicitor, and moves the court for a new hearing herein; and the court having considered said motion, and being fully advised in the premises, it is ordered that said motion be, and the same is hereby, overruled.

*Appeal.*

138 Thereupon said defendant prays an appeal to the Supreme Court of the United States from the decree rendered in this cause, which is allowed; and the said defendant presents his appeal bond, with surety, duly executed as required by law, which said bond is by the court approved and ordered to be filed and made a part of the record herein.

Said bond is in the words and figures following, to wit:

Know all men by these presents that we, Frederick W. Biebinger, assignee of Yaeger & Co., as principal, and Frederick W. Biebinger and John C. H. D. Block, as sureties, are held and firmly bound unto Continental Bank in the full and just sum of twelve thousand dollars, to be paid to the said Continental Bank, its legal representatives or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this 30th day of Octo-
139 ber, in the year of our Lord one thousand eight hundred and seventy-five.

Whereas lately, at the September term, 1875, of the circuit court of the United States for the eastern district of Missouri, in a suit depending in said court between Continental Bank, plaintiff, and Frederick W. Biebinger, assignee of Yaeger & Co., judgment was rendered against the said defendant, and the said Frederick W. Biebinger having appealed to the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Continental Bank citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington the second Monday of October next:

Now the condition of the above obligation is such, that if the said F. W. Biebinger, assignee, &c., shall prosecute said writ to effect, and

answer all damages and costs if he fail to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of—

140 FRED'K W. BIEBINGER, [SEAL.]
*Assignee of Yaeger & Co.*
FRED'K W. BIEBINGER. [SEAL.]
JNO. C. H. D. BLOCK. [SEAL.]

Approved by—

SAMUEL TREAT, *Judge.*

141 UNITED STATES OF AMERICA,
*Eastern District of Missouri, ss:*

I, M. M. Price, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify the writing hereto attached to be a true and complete transcript of the record and proceedings in case No. 248, of The Continental Bank, plaintiff, against F. W. Biebinger, assignee, &c., defendant, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office in the city of St. Louis, in said district, this 29th day of November, in the year of our Lord eighteen hundred and seventy-five.

M. M. PRICE,
*Clerk of said Court,*
By A. P. SELBY, *Deputy.*

(Indorsement on cover:) No. 107. Frederick W. Biebinger, assignee of Yaeger & Co., appellants, vs. The Continental Bank of Saint Louis. E. Missouri C. C. U. S. Filed 7th April, 1876.

NO. 107.

*OCTOBER TERM, 1878.*

# SUPREME COURT OF THE UNITED STATES.

FREDERICK W. BIEBINGER, ASSIGNEE OF YEAGER & CO.,

*Appellant.*

VS.

THE CONTINENTAL BANK OF SAINT LOUIS,

*Appellee.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

## STATEMENT AND BRIEF FOR APPELLANT.

BROADHEAD, SLAYBACK & HAEUSSLER,

Of Counsel for Appellant.

## APPELLANT'S STATEMENT AND BEIEF.

### STATEMENT.

This is a suit brought by appellee, the Continental Bank, a corporation incorporated under the laws of the State of Mo., and doing business in St. Louis, Mo., against Frederick W. Biebinger, assignee in Bankruptcy of Yaeger & Co. a firm composed of Henry C Yaeger and John Crangle.

The appellee's bill substantially avers the following facts. The continentalBank was incorporated and did business under the name of National Loan Bank until June 1873, when it was changed to Continental Bank.

Yaeger & Co. were adjudged Bankrupts October 24,1873, appellant was elected their assignee and qualified in the Dist. Court of the Eastern District of Missouri and all the real and personal property of said Bankrupts was duly transferred to him. Said firm of Yaeger & Co commenced to do business with the appellee about September 24, 1867, and as such, appellee from time to time advanced them large sums of money in discounting their drafts and commercial paper. To secure itself from loss on account of such advances, it at one time required of them collateral security. and in compliance therewith said firm deposited, in the winter of 1867, as such collateral security for advances and discounts *to be made* to them, among others a negotiable promissory note for the sum of $20,000, dated March 23rd, 1867, made by C. Harryman & Co., payable on or before two years after date, to the order of Yaeger & Co., and by them endorsed, bearing ten per

cent. interest after maturity, secured by deed of trust on real estate situate in the town of O'Kaw, county of Washington, State of Illinois.

Said above mentioned note was so held as collateral security by the appellee until about Feb. 11th, 1871, at which time Yaeger & Co. were indebted to appellee in a sum exceeding the sum of $40,000, and as said note was long past due, said Yaeger & Co. were allowed to withdraw said note and deed of trust among others, for the purpose of enforcing their collection by fore closure, under said deeds of trust, upon representing to appellee that the same was necessary for accomplishing said purpose, and upon entering into a written agreement with appellee.

On the 2nd, day of March 1872, Yaeger & Co. obtained in the Circuit Court of the United States for the Southern District of Illinois, a decree of foreclosure against C. Harryman & Co., under which decree said property in the town of O'Kaw was sold and bought in by Yaeger & Co., and Yaeger and Crangle received from the Master in Chancery for said circuit court a deed therefor, dated December 6th, 1872.

That about the month of December 1872 Yaeger &Co. in accordance with the written contract, deposited as collateral security in place and stead of the note and deed of trust of Harryman &Co. ,the said Master's deed. Shortly afterwards, the appellee requested Yaeger & Co. to execute a deed of mortgage on said real estate in the place of the deposit of the Master's deed, to secure their indebtedness to appellee; and during the month of June 1873,appellee prepared and presented to Yaeger & Crangel for execution a mortgage for such purpose. Yaeger & Crangle agreed to execute the mortgage as prepared; but having subsequently become bankrupt they have failed and refused to execute said deed. The Bill further alleges that upon the request of appellant, appellee gave into their possession the said Master's deed for the purpose as

represented by appellant of comparing the descriptions of the real estate in said deed with that mentioned in the mortgage. Appellee parted with the possession of said Master's deed upon the distinct understanding, as was expressed at the time and written on the envelope containing said deed, that it was to be used for the above mentioned purpose only, and that it was to be returned to appellee to hold until said mortgage was executed.

At the time of their failure and bankruptcy, Yaeger & Co. were indebted to appellee in a sum exceeding the sum of $45.000, part of which was secured by other collaterals. The amount which appellee will realize from said collaterals cannot now be determined by it, but it says that no matter what may be realized from the same, Yaeger & Co. will still he indebted to it in sum of $ 30.000, which will be wholly lost to it, saving and excepting the dividends which may be received thereon from the estate of Yaeger & Co. in Bankrupcy, which can in no case exceed 20 per cent., un less appellant be compelled to perform the contract of Febuary 11th, 1871, and unless the lien and mortgage of this appellee on the real estate above described which said real estate is worth not more thau $10,000, be enforced by the order and decree of this Honorable Court.

The prayer of the appellee was, that an account might be taken of the amount due it, and that appellant might be decreed to pay said amount, and in default of such payment, that a decree might be rendered for foreclosure and sale of said real estate, and that the proceeds of such sale might be applied to the payment ot said debt; or if that was not done that the court decree a specific performance of the contract of Yaeger & Co., by which they promised to execute a deed of trust on said real estate above described—and for general relief.

The answer denies generally, the material allegations of the bill.

It appears from the testimony substantially, that in 1867, the firm of Yaeger & Co. commenced doing busines with the bank and except for an interval, hereafter more particularly mentioned, continued to do business with the bank nearly up to the time of the bankruptcy of the firm. The business of the bank with Yaeger & Co., consisted of the bank taking and discounting their bills and notes in the usual way of banking business. Yaeger & Co.'s general liability account with the bank ran during the period mentioned, from $25,000 to $125,000, on paper drawn by them on their customers, and discounted on its merits. Mr. Edgar, president of the bank testifies that when he found their discounts runing up to a large amount, he demanded of them security. Thereupon Yaeger & Co. deposited with the bank, among others the note and mortgage in question , this remained with the bank until Feb. 11th, 1871, when they were given up to one of the members of the firm, by the president of the bank and the receipt copied in statement referred to taken at the time.

RECEIPT.

"Whereas the subscribers being indebted to the National Loan Bank of St. Louis, to a considerable amount in notes and sundry drafts, aud having given to said National Loan Bank the following described notes secured by deed of trust to secure the said bank *against any loss to wit*:

1st. Note of C. Weihe & Co. for twenty thonsand dollars, payable one year after the 26th, day of September, 1866, with ten per cent- interest from date.

2nd. Note of C. Harryman & Co. for twenty thousand dollars, payable two years after March 23rd, 1867, with ten per cent. interest after maturity.

Now whereas the said National Loan Bank, at the request and desire of said Yaeger & Co., having delivered up to *said Yaeger & Co. the above described notes for the purpose of disposing of them*, it is hereby agreed by said Yaeger & Co.,

that in case they should not return these above mentioned notes to the National Loan Bank *within a reasonable time*, the said Yaeger & Co. hereby agree to replace them by *other collateral* securities of equal value, to be approved by the said National Loan Bank.

St. Louis, Mo. 11th, Feb. 1871.

WITNESS: YAEGER & CO."

EMILE KARST.

[5c. U. S. rev. stamp.]

At the time this receipt was given and the collaterals withdrawn, Yaeger & Co. were indebted to the bank about $50,000., for which amount the bank had taken the drafts of Yaeger & Co.. with other parties names upon them.

The collateral never was returned to the bank; but Yaeger & Co. proceeded to foreclose the mortgage made to secure the note, and obtained a decree of foreclosure from the United States circuit court for the Southern District of Illinois. The property was sold under the decree, by a Master in Chancery, and bought in by Yaeger & Co.; and the deed made to them by the Master was afterwards deposited with the bank, it is claimed, to be held by it in lieu of the collaterals. The bank insisted that Yaeger & Co. should make a deed of trust on the property to secure it in the amount of their indebtedness, which was never done. This deed it is claimed was deposited with the bank in 1872, and was returned to Yaeger & Co. to enable them, as they stated to compare the description of the property with the deed of trust, which had been prepared for them to sign, but which was never executed.

At the time of the bankruptcy of Yaeger & Co, they owed the bank between $35.000 and $40,000; but there was a period, about September 1871, when the relations between the bank and the bankrupts were broken off, and the bankrupts owed the bank little or nothing.

After giving the receipt above set forth Yaeger & Co. went on doing business with the bank. offering their business paper for discount, what suited the bank was taken, and what was not deemed good by the board, rejected. No paper was taken unless it had two names on it.

The bnsiness was carried on in the same way between the parties up to the time of the bankruptcy of Yaeger & Co. except during certain intervals, when nearly all paper was paid.

From February 1871 to June 1873, over two years, no demand was made by the Bank for other security or for the return of the note. At the time of the Bankruptcy of Yaeger & Co. the Bank did not hold any paper of theirs,that was discounted by it, prior to Feb., 11, 1871 the date of the receipt, nor did they owe the Bank anything that was owing or for which they were liable at that time. Yaeger & Co. went into Bankruptcy December 22 nd, 1873. After the Bill was filed the property was by consent sold under order of Bankrupt court, and assignee, received and holds the proceeds until this cause is finally decided, if antagonistic to him the bank gets the money and if in his favor it is to be distributed to all creditors including appellee share and share alike, for although they had not at trial proven their demand they can do so at any time and receive their dividend the same as the other creditors.

The court rendered a decree giving the entire fund to appellee and from this, appeal was taken.

From this state of facts the question arises,whether the Bank at the time of the backruptcy of Yaeger & Co., held any equitable lien upon the collaterals mentioned, or rather any lien upon the real estate which had been purchased by Yaeger & Co. under the decree of foreclosure above mentioned, or the proceeds thereof as against the general body of creditors represented by the appellant in his official capacity, and appellant cleimes their was none.

And that after such a lapse of time appellee cannot maintain any such secret trust, whilst it has allowed Bankrupts to deal with the notes in the courts as their own absolute property, thus giving them credit for means which if appellee succeeds in this proceeding were really appellee's, and which appe l lee if dealing in good faith should have collected and prosecuted in its own name.

## BRIEF.

1st. The United States circuit conrt of Missouri had no jurisdiction in equity to decree the specific performance of a contract, the subject matter of which, the land, is situate in the State of Illinois, and the original parties to the same, as well as both appellant and appellee were, and are citizens of the state of Missouri. This proceeding was no part of the bankruptcy proceeding, except in so far as it is made so by the agreement made after the bill was filed to allow the assignee to sell the land and hold the proceeds as a stakeholder. Inasmuch as the bill merely seeks to reach the title to the property, the fact that this suit was brought against an assignee in bankruptcy gives the Circuit Court no jurisdiction over this cause. But as we are anxious to have this cause determined on its merits, we do not press the point.

2nd. With respect to the courts allowing parol evidence to be introduced, altering, qualifying and extending the agreement of February 11th, 1871, we claim was certainly error. The interpretation of the agreement must depend on its own terms. There is no principle more elementary, both at law and in equity than that which excludes parol evidence offered to explain, enlarge or vary the terms of a written contract. This rule of evidence has by operation of the statute of Frauds become in relation to real estate a cannon of property. The agreement in question is full, plain and pre-

cise; so much so, that any man of ordinary mind does know its exact meaning. The only sound and reasonable understanding conveyed by this agreement is *and originally was* that Yaeger & Co. deposited certain notes secured by a mortgage on the land in question as collaterals to secure advances made from time to time on notes and drafts; that Yaeger & Co. desiring to dispose of them, asked the bank's permission to withdraw them, agreeing, however, that should they not return them within a reasonable time, they would replace them by other collaterals of equal value, satisfactory to the bank.

Is there any mistake, accident or fraud in this, warranting parol evidence? Was there any proven by the oral evidence to have been used, or in existence at the time of its execution? Why, then, allow the introduction of parol evidence of what was done and said before as well as after the execution of the same, thereby altering, enlarging—in fact, giving it a totally different meaning.

This proposition of law is laid down most emphatically in

2 Story § 1531.
Starkies' Evi. (Sharswood 8th Am. Ed.) *665, to*661.
Siter vs. M'Clanahan 2 Grattan, 314.
Pelter vs. Collins, 3 Wend. 459.
Preston vs. Merceau, 2 Bl. 1249.
Rich vs. Jackson, 4 Bro. C. C., 515.
Phillipps on Evi. Part II, Chap. VIII, § 1, p. 676.

The latter says: "This rule applies with still greater force "to all written agreements which are required by theStatute of "Frauds to be in writing. They can not be contracted or "added to or subtracted from or substantially varied by pa- "rol."

3rd. What equitable *trust* estate can appellee at most have.

It is true trusts may be created by parol, which being however adverse to the policy of the Statute of Frauds, requires

the *clearest proof*, such proof must be *satisfactory*, and not merely sufficient to warrant a vague *conjecture*. There is no evidence at all which would warrant the Court to establish a trust—

(*a*) Not a *Resulting Trust*, for these are such as arising from the *presumed intention* of the parties redound to the *benefit of the grantor*.

1 Spencer's Eq. Jur. 510-'11

1 Lom. Dig. 233.

Fontl. Eq. B II, C V, § 1, n (*a*).

(*b*) Not an implied trust for these arise from the *presumed intention* of the parties, and redound to the benefit, not of the grantor but of *third parties*.

*Ibid.*

For in this case the land was bought in and conveyed to Yaeger & Co., whilst the consideration was not paid by appellee, besides, appellee expressly says that Yaeger & Co. were to buy the land in their own name.

(*c*) Not a constructive trust, for they arise *independently of the intention* of the parties, by construction of law; *being fastened upon the conscience* of him who has the legal estate, in order to prevent what otherwise *would be a fraud*. They occur where the property was acquired by fraud or improper means, and also where it has been fairly and properly acquired, but under circumstances which render it contrary to the principles of equity that it should be retained.

*Ibid.*

There was no fraud or improper means resorted to by Yaeger & Co. in acquiring the O'Kair property, nor is there any charged. They simply applied to the bank for the notes and mortgage, with the *intention of disposing of them*, as the *agreement* says, or according to the *parol evidence*, of bringing foreclosure suits.

In the agreement they were not prevented from disposing

of the notes by taking lands or anything else for them. That simply says that in case they did not *return them within a reasonable time*, they were to replace them by other colateral securities of equal value to be approved by the bank. So far no constructive trust arises.

Besides, however, the oral evidence introduced was that Yaeger & Co. promised before as well as after this written undertaking that shouldthey not be able to deposit other good and satisfactory security that they then were to give *a mortgage* upon the property to secure the bank's debt, should they become the owners of the same. Whether they be consideredas trustees or agents of the bank,the proof *is satisfactory* that they did not buy the land—with trust money, but on the contrary, the parol evidence itself shows that they had the undoubted right to purchase in their own name, and therefore does not warrant a constructive trust.

4th. The next question is did the written agreement together with the oral evidence give appellee an equitable mortgage?

(*a*) That the agreement of February 11th, 1871, itself did not create an equitable mortgage is only too plain to require any further consideration. Did, then, the oral evidence introduced to qualify, vary and extend the intent of the agreement give appellee such a claim?

Here is a verbal contract for the specific performance of which this appellee sues, by which an estate is to be conveyed to it by Yaeger & Co., not then and there, but in the future. That this proposition of law according to our Statute law—[Wagn. Stat. chap. 62, §2 and 5, and the decisions of our Supreme Court,

Curle vs. Eddy, 24 Mo. 117.

Wiley vs. Robert, 31 Mo. 212.]

does not hold good as against Yaeger & Co. themselves, much less against the appellant is too apparent for further

argument. The evidence conclusively shows that not one dollar of the debt due at the time of entering into the agreement referred to, remained due at the time of the bringing of this suit, but years before had been paid. How much more strange is the proposition, when we consider that the debt due appellee having accrued in subsequent advances on notes and drafts for the security of which no provision had been made at any time, except and only the security of two good endorsers, which appellee carefully required at each of such advances.

Credits are to be applied in order of time to the oldest debts.

1 Story Eq. § 459.

2 Parsons Cont. 633.

And this is the rule whether the first items of a rnnning account are secured or not.

Johnson vs. Anderson 30 Ark, 745.

U. S. vs. Kirkpatriek, 9 Wheat. 737.

The evidence besides is most conclusive that the debt for which this agreement in question was made had long before the institution of this suit been paid. Yet appellee, in the most equitable spirit asks for the specific performance of a *most* equitable mortgage to secure its subsequent inequitable debt, not regarding in the least the equity of subsequent co-creditors of Yaeger & Co.

(*b*) The next proposition of this doctrine is, whether the deposit of the deed to Yaeger & Co. with the bank, created an equitable mortgage.

*First*, in respect to the soundness of this doctrine as shown by the evidence introduced in this cause, we find that the deed was never deposited with the appellee by Yaeger &Co. but that the appellee got the same from Yaeger &Co.'s cashier, for the purpose as was understood by appellant's exactly showing to the bank what had been done with the mortgage,

or as the president of the bank hesitatingly says, for the purpose of getting the description of the property, so as to prepare a mortgage upon said lands, to be executed by Yaeger & Co. at some future time, to secure an indefinite amount, according to a most false parol understanding of the bank with Henry C. Yaeger. Therefore, according to the unquestioned authorities, that the doctrine where it prevails at all, shall not be extended beyond the *letter of the precedents;* and that in order to create the lien there must be an actual and bonafide deposit (and not a mere agreement to make deposit) of the title deeds with the mortgagee himself; the *evidence in the case* of itself does not warrant the establishment of an, equitable mortgage on the doctrine of the deposit of title deeds.

But, *secondly*, granting for the sake of argument that the evidence showed an actual and *bona fide* deposit of the Master's Deed, to Yaeger & Co.; did this deposit of the Master's with the bank in itself create such on equitable mortgage that warranted the United States Circuit Court to decree specific performance.

The doctrine that the deposit of the title deeds of an estate as a *security for a loan* or *advance of money*, constitutes an equitable mortgage upon the estate seems to be well established in England, although often lamented. This doctrine most unfortunately has found, to some extent, acquiescence in the United States, particularly New York and South Carolina.

It is manifests enough, that in England where they have no general registry, the possession of the title deeds is the only and for the most part a sufficient evidence of the owner's title and necessary for the assertion and maintenance thereof. Notwitshstanding which, the doctrine has received very serious opposition from Lord Eldon, Sir William Grant and other eminent jurists. How much more is this doctrine, so justly considered as at war not only with the policy of the

statute of conveyances, but also that of registry which obtains so universally in this country. For with us the owners of estates do not regard the security and permanence of their titles as depending mainly upon their preserving and keeping in possession the deeds, but in having them enrolled upon the proper record. Hence it is apparent that the great weight and consequence attached in England to the possession of the title deeds can have properly no such application here. In truth to permit such a mortgage to be created would wholly frustrate the wise intent of those laws. This doctrine however,is not applicable to this case inasmuch as in England and in New York as well, where the equitable right is said to be created, it exists only when an *advancement is made upon the faith of the deposit*, never to secure a precedent debt or create a trust by which a lien would enure to prior creditors

Our view is most emphatically established in the following authorities :

Vanmeter vs. M'Faddin, 8 B. Monroe, 435–437.
Bicknell vs. Bicknell, 31 Vt. 498.
Probasco vs. Johnson et al., 2 Disney, 96.
Edwards Exec'rs vs. Trumbull, 50 Penn. S. 509.
Henderson vs. McGhee, 6 Heisk. (Tenn.), 55.
Shitz vs. Dieffenbach, 3 Penn. S. 233.
Johnson vs. Anderson, 30 Ark. 745.
Borvers vs. Oyster, 3 Penrose & Watts, 239.
Siter vs. McClanchan, 2 Grattan, 280–314.
Colguhoun vs. Atkinson, 6 Munf. 550.
2 Story Eq. § 1020 and § 1531.
Berry vs. Mutual Ins. Co. 2 John. ch. 603.

Which latter opinion by Justice Kent is in direct contravention of the reasoning in 2 Sandford,h C. 10. Although not in direct terms decided by the Supreme Court of this State, yet the doctrine undoubtedly will never be allowed foothold in

Missouri because it is contrary to the statute law. (Wagner's Stat. chap. 62, § 2 and 5 ; chap. 35, § 24).

And under the Statutes of Illinois, where the land lies the law is equally strict (Statutes of Illinois, 1878, chap. 6§ 1, 2 and 2, p. 646; Chap. 30, § 28 and 30, p. 320.

## SUMMARY.

To briefly sum up the merits of this cause, seems hardly necessary, as each and every proposition advanced by the appellee is most clearly inequitable and unjust. This suit is not against Yaeger & Co.,but against their assignee in bankruptcy, to whom the Bankrupt Law has given the absolute control and custody of the land in question for the benefit of Yaeger & Co.'s creditors. Among the many specific reliefs prayed for, is the specific enforcement of the agreement of February 11th, 1871, *now* over *three years* after the date. Hence the inequity of this doctrine when by said written agreement it was expressly stipulated in case said Yaeger & Co. should not return the notes to the bank within a reasonable time, then they were to replace them by other collateral securities of equal value, to be approved by the bank.

A court of equity will not prejudice the rights of creditors when the party seeking its aid has so carelessly and indifferently allowed its rights to slumber for such a long period, to the prejudice of others. It was its duty to have protected and enforced its rights in a *reasonable time*, and had it done so it could easily have protected itself, for then Yaeger & Co. were fully solvent. The appellee being well aware that the written agreement of itself could not maintain its unjust and inequitable prayer, found it necessary to resort to the introduction of parol evidence to supply the defect. And wha kind of parol evidence is introduced? Nothing positive and certain, but on the contrary only the most vague and conjectural kind, whereas the authorities are uniform in holding that

the proof in such a case must be clear and convincing.

The proof in the case at bar not only fails in this regard, but its tendency is actually adverse to the alleged equities, and there can be no question that, as between the appellant representing all the creditors and the appellee, the finding of the court below is erroneous.

All which is respectfully submitted.

BROADHEAD, SLAYBACK & HAEUSSLER,

ATT'YS FOR APPELLANTS.

No. 107.

*OCTOBER TERM, 1878.*

# Supreme Court of the United States.

FREDERICK W. BIEBINGER, Assignee of YAEGER & CO.,

*Appellant,*

*vs.*

THE CONTINENTAL BANK of St. Louis.

*Appellee.*

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

*STATEMENT AND BRIEF FOR APPELLEE.*

HITCHCOCK, LUBKE & PLAYER,

*of Counsel for Appellee.*

SAINT LOUIS:

PIERCE BROS., PRINTERS, 211 NORTH THIRD STREET.

1878.

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(Appeal from the Circuit Court of the United States for the Eastern District of Missouri.)

## ABSTRACT AND POINTS AND AUTHORITIES FOR APPELLEE.

### ABSTRACT.

Trans. p. 1. February 19, 1874, appellee, a corporation doing a banking business under the laws of the State of Missouri, filed in the Circuit Court of the United States for the Eastern District of Missouri, its bill in equity against appellant, as assignee in bankruptcy of Yaeger & Co., alleging in substance that Yaeger & Co., were adjudged bankrupts October 24, 1873, by the U. S. District Court for the Eastern District of Missouri; that in 1867 said Yaeger & Co., composed of H. C. Yaeger and John Crangle, commenced to do business with appellee as their banker, appellee from time to time mak-

ing large discounts for them and advancing to them large sums. That, shortly thereafter, appellee required Yaeger & Co., to deposit collateral security for advances and discounts made and to be made, and that in compliance with such requirement Yaeger & Co. did in the winter of 1867 deposit with the bank (appellee here), as collateral, a certain note made by C. Harryman & Co. for $20,000, dated March 23d, 1867, payable two years after date, and secured by deed of trust on certain real estate in O'Kaw, Ills.; that after said deposit of collateral with the bank, it continued to do business with Yaeger & Co., and, in the faith of such deposit, from time to time advanced to Yaeger & Co. large sums of money up to the time of the failure of Yaeger & Co. in 1873, when they owed the Bank over $30,000, not otherwise secured than by said collateral, and which would be wholly lost to the bank (saving a small dividend therein, which could not exceed twenty per centum), except for said collateral, and that the real estate securing said collateral was not worth over $20,000.

The bill further states that about February 11th, 1871, (Yaeger & Co. being then indebted to the bank in over $40,000, and said collateral note having long since become due), said Yaeger & Co. applied to the bank for leave to take the note and deed of trust aforesaid, and stated to the officers of the bank, having charge of its business, that it was necessary for them to have said note, and deed of trust, securing the same, in order that the collection of said note might be enforced, or that the title to said real estate so mortgaged might be made absolute in said Yaeger & Co., by foreclosure and sale under said deed of trust, for the benefit of the bank, and that thereupon, in the faith of such representations and of the written agreement of said Yaeger & Co. (which is in evidence in this case), the bank entrusted the pos-

session of said note and deed of trust to said Yaeger & Co. for the purposes aforesaid only; that shortly after receiving said note and deed of trust, Yaeger & Co. instituted foreclosure proceedings thereon in the Circuit Court of the United States for the Southern District of Illinois, and that thereafter such proceedings were had in said cause that a decree of foreclosure was rendered therein in favor of said Yaeger & Co.; that a sale was thereafter had of said real estate under said decree, at which Yaeger & Co. became the purchasers thereof, and that on December 6, 1872, a deed for said property was made to said Yaeger & Crangle by John A. Jones, master in chancery of said Circuit Court, acting under said decree; that in and by said agreement of February 11, 1872, said Yaeger & Co. promised and agreed that in case they should not return said notes and deed of trust to the bank within a reasonable time, they would replace them by other collateral securities of equal value to be approved by the bank; that shortly after the making of said deed by said master in chancery, said Yaeger & Co. did, in compliance with the terms of their said contract, and in part performance thereof, deposit with the bank as collateral security, and in place of said note and deed of trust, the said master's deed; that thereafter the bank requested Yaeger & Co. to execute to it a mortgage on said real estate, which they agreed to do, and the bank thereupon had one prepared, which Yaeger & Crangle agreed to execute, but before doing so failed in business, and that afterwards they refused to execute the mortgage.

The prayer of the bill is for a foreclosure and sale of the property, covered by the master's deed, and the application of the proceeds to the satisfaction of the claim of the bank, or that if it should appear that the appellee was not entitled to the relief prayed for, then that appellant might be decreed to specifically perform

the contract of said Yaeger & Co., and for general relief.

Trans. p. 5. The bill was duly verified.

Trans. pp. 6–7. The appellant appeared and made the following pleas to the jurisdiction of the court:

1st. That the said cause of action was instituted by complainant without having first obtained any leave to sue from the court.

2d. That the petitition seeks to effect the title to lands which are situated out of this, the Eastern District of Missouri, to-wit: in the Southern District of Illinois.

3d. That complainant is a corporation, created under and by the laws of the State of Missouri, and as such, is a citizen of said state, and that respondent is also a citizen of said state.

Trans. p. 7. Which said pleas were, by the court, overruled.

The appellant thereupon filed his answer, not under oath, by which he denied specifically the statements of the bill, except those descriptive of the parties to the cause.

Trans. p. 10. To which answer the appellee filed its replication in the usual form.

Trans. p. 10. On the 28th day of October, 1875, and during the September Term, 1875, of said court, said cause was heard upon the pleadings and proofs.

Upon the hearing, appellee read in evidence the receipt or agreement mentioned in the bill, which is as follows:

Trans. p. 10. "Whereas, the subscribers being indebted to the "National Loan Bank of St. Louis, to a considerable "amount, in notes and sundry drafts, and having given "to said National Loan Bank the following described "notes, secured by deed of trust, to secure the said "Bank against any loss, to-wit:

"1st. Note of C. Weike & Co., for $20,000, payable "one year after the 26th day of September, 1866, with "ten per cent. interest from date.

"2d. Note of C. Harryman & Co., for $20,000, pay- "able two years after March 23d, 1867, with 10 per cent. "interest after maturity.

"Now, whereas, the said National Loan Bank, at "the request and desire of said Yaeger & Co., having "delivered up to said Yaeger & Co. the above described "notes, for the purpose of disposing of them, it is hereby "agreed by said Yaeger & Co., that in case they should "not return these above mentioned notes to the Nation- "al Loan Bank, within a reasonable time, the said "Yaeger & Co. hereby agree to replace them by other "collateral securities of equal value, to be approved by "the said National Loan Bank.

"St. Louis, Mo. 11th of February, 1871,

"(Signed,) YAEGER & Co.

"Witness, EMILE KARST.

"(5 cent U. S. Rev. stamp.)"

Trans. p. 11. Appellee then read in evidence the deposition of Timothy B. Edgar, who testified in substance, that he had charge of the banking business of appellee, and had been so in charge from the time of its incorporatoin; that appellee was incorporated under the name of National Loan Bank, but that about June, 1873, its name was changed to Continental Bank; that the firm of Yaeger & Co. was composed of Henry C. Yaeger, and John Crangle, and that witness had known the firm since 1866; that the firm conducted a milling business in St. Louis, and had done business with appellee from 1867 to about the time of its failure; that throughout that time, with some exceptions, appellee continued to loan money to Yaeger & Co., and to discount their bills and notes in the usual course of business; that Yaeger & Co.

also made deposits from time to time with appellee; that during the time that Yaeger & Co. did business with appellee, their indebtedness to appellee varied from $25,000 to $125,000; that during the second year that Yaeger & Co. did business with appellee, their liability to appellee was running up to a large amount, $50,000 or over; that witness informed Yaeger & Co. that they would have to deposit collaterals with the bank before the bank could extend their line of discount; that Yaeger & Co. did not at once comply with the suggestion, and that appellee thereupon declined discounting for them, but that sometime afterwards Yaeger & Co. deposited with appellee, as collateral security, the notes and deed of trust mentioned in the receipt and in evidence; that thereupon appellee commmenced again to discount for Yaeger & Co., and continued so to do until the failure of Yaeger & Co.; that the collaterals above mentioned remained with appellee for two or three years, until Yaeger came to the bank and desired witness to allow them to take the collaterals, stating that they desired to foreclose the mortgages and sell the property, and that whatever they got when the property was sold, whether money or anything else, they would bring the security to appellee, and appellee would remain the same, and that thereupon witness gave to Yeager the notes and deeds of trust; that when Yaeger & Co. withdrew the collaterals, they also gave to appellee the receipt read in evidence; that at the time when the collaterals were withdrawn, Yaeger & Co were indebted to appellee in the sum of from $50,000 to $75,000; that subsequent to the time when Yaeger & Co. took the collaterals, they returned to appellee the deed of the master in chancery to Yaeger and Crangle for the property in O'Kaw, Illinois, which was covered by one of the deeds of trust, and that at the time they deposited said master's deed with appellee, Yaeger stated that it was the same collateral security

which appellee had before, except that it was in the shape of a deed of the property in lieu of the notes; that thereafter witness looked the deed over, and it was thought that appellee's interest would be better secured by a mortgage on the real estate therein described; that witness mentioned the matter to Yaeger, who consented that the attorneys for appellee should draw the paper up in any way they suggested to secure appellee's interest; that witness had appellee's attorney, Mr. Gray, draw up a deed of trust, or mortgage to appellee, on the property, which deed of trust was shown to Yaeger, who said that he and his partner, and their wives, would execute it and return it to appellee, and that shortly afterwards Yaeger & Co. failed, and for that reason the matter fell through; that from the time that the deed of the master in chancery, was deposited with appellee in 1872, appellee held it until the deed of trust was drawn up, at which time Yaeger's attorney requested permission to take the master's deed for the purpose of comparing the description therein with the description in the deed of trust; that witness allowed him to take it for that purpose, after consulting with appellee's attorney, Mr. Gray, causing Mr. Gray at the same time to write a memorandum on the envelope which contained the deed, stating why it was delivered up; that at the time Yaeger & Co. failed, appellee had some collaterals for their acceptances, besides that involved in this suit but that after deducting all amounts realized on these additional collaterals, Yaeger & Co. still owed appellee from $35,000 to $40,000.

Trans. p15. On cross examination, witness stated that at the time the collaterals were handed to Yaeger & Co. he thought Yaeger was a stockholder in the bank; that without reference to the books of the bank, he could not give in detail the names of the parties to the paper on which Yaeger & Co. were indebted to the bank; that Yaeger

& Co. were still indebted to the bank on renewals of paper on which they were indebted in 1872; that when the notes and deed of trust were placed with the bank as collateral, there was no written agreement accompanying the deposit; that before Yaeger & Co. deposited the collaterals in 1867 the bank had shut down on them and refused to discount further; that the deed of trust or mortgage was given to Yaeger to execute before his failure.

Trans. p. 19. On re-examination witness stated that the notes secured by deed of trust which were deposited with the bank by Yaeger & Co. were endorsed so that they passed by delivery.

Trans. p. 19. Appellant at the time objected to all evidence in regard to what was said or done as to the withdrawal of the securities that appellee had held on the ground that it was irrelevant and incompetent, as the writing which was finally executed was the best evidence of the contract, and in it were merged all of these arrangements and propositions. The court overruled the objection. Appellant also objected to the evidence offered in regard to the deposit of the master's deed and what took place between the company and its attorney and how they regarded the deed, but the court overruled the objection.

Trans. pp. 20 & 26. Appellee next read in evidence the deposition of Emile Karst, who testified in substance that he was the cashier of appellee, and had been, from the time it commenced to do business in April, 1866; that Yaeger & Co. did business with appellee from about 1867 to the time when they failed. Witness then stated the fact of the deposit of the notes and deed of trust as collateral, and that they remained with appellee until about February, 1871, when Mr. Yaeger came in and had some conversation with the witness Edgar which

was reported to the witness by the witness Edgar, and that witness thereupon delivered the receipt read in evidence and saw Yaeger & Co. sign it; that at the time when the receipt was taken, Yaeger said to witness that when the property was sold or transferred, that appellee would be put in possession of the proceeds, either the money or the deeds for the property which secured the two notes; that these collateral notes were never afterwards returned to the bank; that afterwards Yaeger handed to witness the deed of the master in chancery for the property in O'Kaw, Illinois, with the statement that it was a deed, good to appellee, for the property, and that it was the result of one of the notes he had taken; that the master's deed remained in the possession of appellee until the summer of 1873, when he, witness, left for Europe; that about that time the deed was placed in the hands of M. L. Gray, attorney for appellee, for the purpose of having a proper deed of the property made to appellee; that Yaeger had been asked by the witness several times to have the deed drawn up and had consented, but that he finally suggested that it should be drawn by the attorney of appellee; thereupon witness handed the master's deed to Mr. Gray to have a deed of trust drawn up; that at the time when the collaterals were originally demanded of Yaeger & Co. they were indebted to the bank in the sum of about $75,000, and that the bank required collaterals of them, and when they refused to give them, the bank withdrew its line until Yaeger & Co. complied, and deposited the notes and deeds of trust; that Yaeger & Co. are still indebted to appellee in the sum of about $40,000 for which it has no security but the property mentioned in the bill.

Trans. p. 23. On cross-examination appellant's solicitor examined the witness generally concerning the course of business

of the bank, and the indebtedness of Yaeger & Co. to the bank.

Trans. p. 28. Appellee next read in evidence the testimony of M. L. Gray, who said in substance that he was attorney at law, and as such had done business for appellee, and that at the request of the officers of the bank he had prepared a mortgage for Yaeger & Co. to sign, as hereinbefore set out; that he was consulted by the witness Edgar as to whether he should allow the attorney for Yaeger & Co. to take the deed of the master in chancery for the purpose of comparing the description with that in the mortgage which witness had prepared, and that he had advised Edgar to allow the attorney to take it for that purpose, and had made a memorandum on the envelope containing the master's deed, stating the purpose for which it was allowed to go.

Trans. p. 30. Appellee next read in evidence the deposition of Henry C. Yaeger, who testified in substance that he was one of the firm of Yaeger & Co., which did business with the bank up to July 1873; that appellee was the general banker of the firm of Yaeger & Co.; that he recollected the deposit of the collaterals; that he signed the receipt of February 11, 1871; that the notes and deed of trust were withdrawn by his firm for the purpose of suing on them in court; that this firm did bring a foreclosure suit on the deed of trust upon the property in O'Kaw, Illinois, and under that suit got possession of the property, which was the same property described in the master's deed; that under the foreclosure proceedings, his firm got the deed of the master in chancery, of which the one shown to the witness seemed to be a copy; that he did not recollect what he had done with the deed of the mastery in chancery which had been received by his firm; that his firm were applied to by appellee to give it a mortgage on the O'Kaw property after appellee received

the deed of the master in chancery, but that it was neglected on both sides.

Trans. p. 31. On cross-examination witness stated that the property, notes and deeds of trust, were left as a general collateral at the request of appellee; that in May and June, 1873, his firm was insolvent, but was hoping to swing through; that from the time when his firm commenced to do business with appellee, there were times when appellee would take very little paper—could not specify the times more particularly; that the paper of his firm first went to protest early in July, 1873.

Trans. p. 33. Appellee next read in evidence the deposition of William C. Little, who testified in substance that he had been connected with appellee in business for about four years, and had a very close connection with the business of the bank; that he knew of the fact that the deed for the property in O'Kaw, Illinois, was in possession of the bank about June 1873, and had seen the paper; that after Mr. Karst left for Europe, about that time Mr. Crangle came in to get the deed to have the matter fixed in some different way; witness did not exactly understand how; that after the master's deed had been given to Yaeger & Co. witness spoke to Crangle about bringing in the other paper, and that he put it off from time to time for some reason or other.

Trans. p. 34. On cross-examination witness stated that the bulk of the business of the bank with Yaeger & Co. was discounting drafts on shipments which Yaeger & Co. represented to have been made; that it would appear from the bank book of Yaeger & Co. that they ceased to do business with the bank from February 2, 1872, to March 20, 1872.

Trans. p. 36. Appellant objected to all portions of the depositions which stated the conversations at the time of the

giving of the receipts for the notes by Yaeger & Co., and also those of the deposit of the master's deed, and conversation between the officers of the bank and how they regarded the deed; and the court overruled the objections and the appellant excepted; and it was agreed that such objections need not be made to each question, but should apply to all the evidence on these points.

Trans. p. 37. Appellee next read in evidence the unexecuted mortgage or deed of trust spoken of in the testimony of the witnesses, Edgar, Karst, and Little, and dated in June, 1873.

Trans. p. 38. Appellee next read in evidence the record and proceedings of the suit brought by Yaeger & Co. against Harryman and others, to foreclose the deed of trust given to Yaeger & Co., and by Yaeger & Co., deposited as collateral with appellee, covering the real estate in O'Kaw, Illinois; also the deed from John A. Jones, master in chancery of the circuit court of the United States, for the Southern District of Illinois, dated December 6, 1872, and conveying to Henry C. Yaeger and John Crangle, the real estate described in the bill, lying in O'Kaw, Illinois, which said deed recited, among other Trans. p. 53. things, the fact that there was due from Harryman and others to Yaeger & Co., the sum of $8,639, and that at the sale under the foreclosure proceedings, Yaeger and Crangle were the highest and best bidders for the property at the sum of $8,000, and that it was struck off to them for that sum.

Trans. p. 56. Appellee next read in evidence, a stipulation between appellant and appellee agreeing that the property described in the bill might be sold and the proceeds thereof deposited in the registry of the Court to await the determination of this suit, which suit it was agreed should proceed as though no such sale had been made, and that said property was still held by appellant as assignee

and by which it was further agreed that if and when this suit is finally decided in favor of appellee, said fund or so much as is necessary to satisfy the amount decreed to be due, shall be paid over to appellee, and it shall acknowledge satisfaction of such decree except as to costs.

Trans. p. 57. It was admitted on the trial that appellee had never proven its demand against the bankrupt estate. That the property sold lay without the circuit in which the suit was brought, and was of the value of $7,369.90, and that it brought that much at the sale under the stipulation above given; and further that the liabilities of the bankrupts are over $300,000, and that their estate would not pay over twelve (12) cents on the dollar.

Trans. p. 57. The appellant on his part read in evidence the deposition of John Crangle, who testified in substance that he was a member of the firm of Yaeger & Co.; that he was not present when the notes were withdrawn from appellee, but knew that they were withdrawn; that between February 1871 and the time when Yaeger & Co. ceased to do business there were one or two slight interruptions in the business of Yaeger & Co. with the bank; that from April 15th to May 24, 1872, and from February 2d to March 20, 1872, there was no discount obtained by Yaeger & Co. from the bank; that he saw a deed of trust or mortgage drawn up to the bank for his firm to execute sometime in 1873, and that it was on the O'Kaw property; that he did not remember that he saw any of the officers of the bank in regard to executing the paper, though if he did have any consultation it was that he would not sign it; that he did not remember that the officers of the bank ever refused to give the firm any discount unless the papers were returned; that the bank does not hold any paper that it discounted for his firm in 1872.

On cross-examination he stated that occasionally between 1871 and the failure of his firm Mr. Yaeger went to the bank to transact the business of the firm, and that witness was seldom if ever with him, and did not know what happened when Yaeger went alone.

And thereafter and on the 30th day of October, 1875, the Court rendered its decree in this cause, by which it found that appellee was entitled to $7,369.90 in the hands of appellant as assignee, said sum being the proceeds of the sale of the property in O'Kaw, Illinois, under stipulation, and that appellee receive that sum of appellant.

Thereafter appellant filed his motion for a rehearing, which being overruled, he appealed to this Court.

## *POINTS AND AUTHORITIES.*

1.—The Circuit Court for the Eastern District of Missouri clearly had jurisdiction to entertain and determine this case. Acc.

U. S. Stat., at large 4,979;
Morgan v. Thornhill, 11 Wal. (U. S.), 65;
Smith v. Mason, 14 Wal., 491.

The fact that the land described, lay in Illinois, made no difference. The suit was brought in the District where the bankruptcy proceedings against Yaeger & Co. were pending. It was for a long time doubted whether an assignee could sue, or be sued, in any other district than the one where he was appointed.

2. The evidence introduced by appellee, tending to show what was said and done at the time when the receipt or agreement of February 11th, 1871, was executed, and the deed of trust and notes on the O'Kaw property

were delivered up to Yaeger & Co., in accordance therewith, is competent and relevant, because—

(a). The paper of February 11th, 1871, is ambiguous, or uncertainly expressed in two respects. It recites the fact that Yaeger & Co. are indebted to appellee to a considerable amount, and that as collateral for this indebtedness they had given appellee the note and deed of trust, securing the same on the O'Kaw property. The paper then proceeds:

"Now, whereas the said National Loan (Continen-
" tal) Bank, at the request and desire of said Yaeger
" & Co., having delivered up to the said Yaeger & Co.,
" the above described notes *for the purpose of dispos-*
" *ing of them;* it is hereby agreed by said Yaeger & Co.,
" that in case they should not return the above mentioned
" notes to the National Loan Bank within a reasonable
" time, the said Yaeger & Co. *hereby agree to replace*
" *them by other collateral securities of equal value*, to
" be approved by the said National Loan Bank."

The paper does not say *how* Yaeger & Co. were *to dispose* of the notes. We only learn this important fact from evidence as to what passed between the parties at the time the paper was signed; this evidence, clear and uncontroverted, shows that Yaeger & Co. simply took the securities for the purpose of bringing foreclosure suits. This throws a flood of light on the uncertain or ambiguous language used in the paper, and in no way controverts or varies it.

Again the same evidence explains and particularizes what is meant by the expression that in case Yaeger & Co. did not return the notes they were *to replace them by other collateral securities of equal value.* It shows that by other collateral securities of equal value was meant either the money realized at foreclosure sale, or a mortgage on the land sold, in case Yaeger & Co. bought

it in. The evidence as to the subsequent action of the parties shows also that this was the interpretation they acted on. In fact there could not well be any other collateral of equal value with the deed of trust, except what was realized on the deed of trust at foreclosure sale. None of this evidence controverted or changed the written agreement.

The evidence was admissible in order that the court might construe the writing with a knowledge of the facts to which it related.

Bell v. Bruen, 1 How. (U. S.), 169.

Extrinsic evidence is admissible for the purpose of showing that the uncertainty which appears in the instrument, does not in point of fact exist, and that the intent of the party, though uncertainly expressed, may yet be ascertained, by proof of facts, to such a degree of certainty as to allow the intent to be carried into effect.

2 Phil. on Ev., * pp. 751 and 759.

The court recognizing the fact that the receipt or agreement was not written by a lawyer, but by a person without technical skill, will admit proof of surrounding facts and circumstances to aid it in construing the paper.

Bell v. Bruen, 1 How. (U. S.), 186.

3.—The deposit of the master's deed with the bank worked an equitable mortgage in favor of the bank. The following American authorities hold this clearly :

Welsh v. Usher, 2 Hill's Ch., 171 ;
Rockwell v. Hobby, 2 Sandford's Ch., 9 ;
Hackett v. Reynolds, 4 R. I., 514 ;
Jarvis v. Dutcher, 16 Wisc., 310 ;
Chase v. Peck, 21 N. Y., 584.

In the light of these authorities, added to the unbroken line of English decisions, we insist that the de-

posit of the master's deed gave plaintiff an equitable mortgage in the land described.

4.—But if it did not, then the contract of February 11, 1871, has never been carried out by Yaeger & Co., and plaintiff has a right to have it specifically performed.

It is not a contract for the breach, of which there can be an adequate remedy at law; and it is such a contract as it has been expressly decided equity will decree to be specifically performed.

Robinson v. Cathcart, 2 Cranch C. C. Rep., 590;
Bispham's Principles, sections 368—369—370;
1 Story's Eq., sections 722 and 729.

And the fact of the bankruptcy of Yaeger & Co., and the assignment to Biebinger, assignee, does not deprive complainant of its remedy.

Bisp., 365;
Foster, assignee, v. Hackett, 2 B. R., 133.

5.—After the deposit of the master's deed with the bank, its officers, not being satisfied that their security was such as had been promised, and as they were entitled to, demanded of Yaeger & Co. a mortgage, which they promised to give, and even went so far as to promise to sign a specific mortgage, which plaintiff was finally obliged to have its own attorney draw up, in order to save further delay. And this agreement was, in good consideration, for plaintiff continued on the faith of it to discount for defendant the paper, out of which its $40,000 claim arises, as it had done all along on the faith of the agreement of 1871.

This is a proper case for the application of the principle or maxim that equity regards that as done, which